(9)

No. 04-37
Title: Michael Clingman, Secretary, Oklahoma State Election Board, et al., Petitioners
v.
Andrea L. Beaver, et al.
Docketed: July 8, 2004
Lower Ct: United States Court of Appeals for the Tenth Circuit
Case Nos.: (03-6058)
Decision Date: April 6, 2004
Questions Presented

Date	Proceedings and Orders
Jul 2 2004	Petition for a writ of certiorari filed. (Response due August 9, 2004)
Aug 6 2004	Brief of respondents Andrea L. Beaver, et al. in opposition filed.
Aug 18 2004	DISTRIBUTED for Conference of September 27, 2004.
Sep 28 2004	Petition GRANTED.
Nov 5 2004	Further extension of time within which to file the joint appendix and petitioners' brief on the merits to and including November 22, 2004.
Nov 9 2004	Extension of time within which to file the joint appendix and petitioners' brief on the merits to and including November 11, 2004.
Nov 12 2004	SET FOR ARGUMENT ON Wednesday, January 19, 2005.
Nov 22 2004	Joint appendix filed.
Nov 22 2004	Brief of petitioners Michael Clingman, Secretary, Oklahoma State Election Board, et al. filed.
Nov 22 2004	Brief amici curiae of South Dakota, et al. filed.
Nov 24 2004	CIRCULATED.
Dec 10 2004	Record received from U.S.C.A. 10th Circuit. (1 envelope)
Dec 21 2004	Record received from U.S.D.C. Western Dist. of Oklahoma. (1 box)
Dec 27 2004	Brief of respondents Andrea L. Beaver, et al. filed. (Distributed)
Dec 27 2004	Brief amicus curiae of Coalition for Free and Open Elections filed. (Distributed)
Jan 4 2005	Motion of South Dakota, et al. for leave to participate in oral argument as amici curiae and for divided argument filed.
Jan 7 2005	Motion of South Dakota, et al. for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Jan 11 2005	Reply of petitioners Michael Clingman, Secretary, Oklahoma State Election Board, et al. filed. (Distributed)

Supreme Court, U.S.
FILED
JUL 2 2004

No. 04 37

In The
Supreme Court of the United States

MICHAEL CLINGMAN, GLO HENLEY, KENNETH MONROE, THOMAS PRINCE AND THE OKLAHOMA STATE ELECTION BOARD,

Petitioners,

v.

ANDREA L. BEAVER, FLOYD TURNER, MINELLE L. BATSON, MARY V. BURNETT, SHARON LYNN ATHERTON, ROGER BLOXHAM, STEVE GALPIN, RICHARD P. PRAWDZIENSKI, MICHAEL CLEM, WHITNEY L. BONTIN, JR., CHRISTOPHER S. POWELL, CHARLES A. BURRIS AND THE LIBERTARIAN PARTY OF OKLAHOMA A/K/A LIBERTARIAN POLITICAL ORGANIZATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether Oklahoma's semi-closed primary election law – which allows a political party to invite non-affiliated voters but not voters registered with another political party to vote in its partisan primary but prevents a voter registered with another political party from voting in that primary – violates the First Amendment rights of a political party and its members to associate.

II. Whether the decision in *California Democratic Party v. Jones*, 530 U.S. 567 (2000) requires that a State allow a political party, at its option, to open its political party primary election to any registered voter regardless of that registered voter's political affiliation.

III. Whether the Tenth Circuit Court of Appeals erred in finding that the State of Oklahoma's restrictions constituted a severe burden on the right of association of the political party thereby requiring the regulation to be narrowly tailored to meet a compelling state interest or whether the appropriate standard is the balancing test which has been applied in election cases before this Court.

LIST OF PARTIES

The parties to this proceeding on Petition for Writ of Certiorari are:

Petitioners:

Michael Clingman, Secretary of the Oklahoma State Election Board; Glo Henley, Chairman of the Oklahoma State Election Board; Kenneth Monroe, Vice Chairman of the Oklahoma State Election Board; Thomas E. Prince, Member of the Oklahoma State Election Board

and

Oklahoma State Election Board

Defendants in the District Court and Appellees in the United States Court of Appeals for the Tenth Circuit

Respondents:

Andrea L. Beaver, Floyd Turner, Minelle L. Batson, Mary V. Burnett, Michael L. Seymour, Terry L. Beaver, Robert T. Murphy, Sharon Lynn Atherton, Roger Bloxham, Steve Galpin, Richard P. Prawdzienski, Michael A. Clem, Whitley L. Bontin, Jr., Christopher S. Powell, Charles A. Burris and the Libertarian Party of Oklahoma a/k/a Libertarian Political Organization

Plaintiffs in the District Court and Appellants in the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Michael Clingman, Glo Henley, Kenneth Monroe, Thomas Prince and the Oklahoma State Election Board respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Tenth Circuit reversing the decision and Order of the United States District Court for the Western District of Oklahoma's granting judgment on behalf of the Petitioners following a non-jury trial. The opinion of the Court of Appeals is reported as *Beaver v. Clingman*, 363 F.2d 1048 (10th Cir. 2004). See App. 1.

The opinion of the district court is unreported. See App. 24.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Tenth Circuit entered its Order reversing the district court's opinion on April 6, 2004. Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1). The Petition for Writ of Certiorari is timely filed within 90 days of April 6, 2004.

STATUTORY AND CONSTITUTIONAL PROVISIONS

United States Code, Title 42:
§ 1983. Civil Action for deprivation of rights.

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit or equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. (R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.)

Amendment I to the Constitution of the United States:

> Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment XIV (Section 1) to the Constitution of the United States:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

26 Oklahoma Statutes Annotated, § 1-104:

> A. No registered voter shall be permitted to vote in any Primary Election or Runoff Primary Election of any political party except the political party of which his registration form shows him to be a member, except as otherwise provided by this section.
>
> B.1. A recognized political party may permit registered voters designated as Independents pursuant to the provisions of Section 4-112 of this title to vote in a Primary Election or Runoff Primary Election of the party.
>
> 2. The state chairman of the party shall, between November 1 and 30 of every odd-numbered year, notify the Secretary of the State Election Board as to whether or not the party intends to permit registered voters designated as Independents to vote in a Primary Election or Runoff Primary Election of the party. If the state chairman notifies the Secretary of the State Election Board of the party's intention to so permit, registered voters designated as Independents shall be permitted to vote in any Primary Election or Runoff Primary Election of the party held in the following two (2) calendar years. If the state chairman of one party notifies the Secretary of the State Election Board of the party's intent to so permit, the notification period specified in this paragraph shall be extended to December 15 for the state chairman of any other party to so notify or to change prior notification. A registered voter

designated as Independent shall not be permitted to vote in a Primary Election or Runoff Primary Election of more than one party.

3. Failure to so notify the Secretary of the State Election Board shall serve to prohibit registered voters designated as Independents from voting in a Primary Election or Runoff Primary Election of the party.

STATEMENT OF THE CASE

1. Plaintiffs/Respondents to this action were registered Oklahoma voters and a then-recognized political party who filed the original action pursuant to 42 U.S.C. § 1983 alleging that certain Oklahoma election statutes violated their First Amendment rights to freedom of political association and free speech.

2. Plaintiffs specifically attacked 26 O.S. § 1-104(A) and § 1-104(B)(4), as impermissibly preventing a recognized political party in Oklahoma from opening up its Primary and Runoff Elections to all Oklahoma registered voters regardless of political party affiliation.

3. Political party nominees are chosen in Oklahoma through the use of the primary election format.

4. There are at least four types of primary elections in the United States, although there are some variations within these general species. The four general types of political primary may be referred to as the closed primary, the semi-closed primary, the open primary and the blanket primary. In the closed primary election system, there is a separate primary ballot for each party. No crossover voting is allowed. In the semi-closed primary system, there is a

separate primary ballot for each party, but independents are permitted to vote in a primary election if the party chooses to permit voting by independents. In the open primary system, all voters may, regardless of registration or party affiliation, choose the primary in which they will vote in that primary election. In the blanket primary system, each voter can choose which primary he or she will vote in for each separate office.

5. Under those Oklahoma statutory provisions, a voter registered with a specific political party may vote only in that party's primary and runoff elections. A political party may allow independent voters to vote in its primary and runoff elections under 26 O.S. § 104. Oklahoma's system is considered a semi-closed primary system.

6. Plaintiffs sought declaratory judgment declaring those Oklahoma statutes unconstitutional and requested injunctive relief prohibiting Defendants from enforcing those provisions. Plaintiffs sought to create a "party-option open primary" in which the decision of whether to have an open, closed or semi-closed primary and runoff election is left totally to the discretion of the political party.

7. Plaintiffs' original request for a preliminary and/or temporary injunction was heard by the Court. That request was denied following an evidentiary hearing with the Court finding that there was little likelihood of success on the merits of Plaintiffs' claims.

8. A non-jury trial was conducted before the Honorable Stephen F. Friot, United States District Judge for the Western District of Oklahoma. Following the non-jury trial, the district court issued a Memorandum Opinion finding that the Oklahoma election statutes in question

were constitutional as written and as applied and entered judgment on behalf of the Defendants. (See App. 24).

9. Plaintiffs/Respondents filed an appeal with the Tenth Circuit Court of Appeals. In reversing the decision of the trial court, the Tenth Circuit Court of Appeals determined that the trial court had employed the wrong standard of review and that under strict scrutiny, the challenged statutes were unconstitutional as improper infringements on the Plaintiffs' freedom to associate. (See App. 1).

10. The only statewide primary election for the Libertarian Party during the 2000 election cycle was the primary election for the Libertarian Party nominees for Corporation Commissioner.

11. During the 2000 election cycle, there were 430 registered Libertarian Party members eligible to vote in the Libertarian primary election.

12. By notice to the Oklahoma State Election Board, the Libertarian Party permitted independent voters to vote in its 2000 primary election. There were 2,049 votes cast in that 2000 Libertarian Party primary election for Corporation Commissioner.

13. The number of votes cast signifies that at least 1,619 more independent voters voted than potentially eligible registered Libertarian Party members and suggests that the Libertarian Party candidate was selected by registered independent voters. No other Libertarian Party primary election was conducted in any other race in the year 2000 and no Libertarian Party runoff election was conducted in the State of Oklahoma in the year 2000.

14. There were no Libertarian Party primary elections during the 1998 election cycle.

15. There were 30 registered Libertarian Party members eligible to vote in the Libertarian Party primary election in 1996.

16. The only Libertarian Party primary election during the 1996 elections was a primary election to select the Libertarian party candidate for the United States Senate in which a total of 2,940 votes were cast.

17. The number of votes cast signifies that at least 2910 more independent voters voted in the Libertarian Party primary election to select the Libertarian Party nominee than potentially eligible registered Libertarian Party members suggests that the Libertarian Party candidate was selected by registered independent voters. There was no Libertarian Party runoff election in the State of Oklahoma at any level in 1996.

18. In a usual election year, there will be numerous political party primary elections. There were primary elections in Democratic races for three United States House of Representative seats and runoff elections in two of those races. There were primary elections in Republican races for four United States House of Representative seats. There were also numerous party primaries and runoffs in state house of representative races, state senate races and county office elections. There were no statewide primary or runoff elections for the Democratic or Republican Party nominees in 2000, as there was no U. S. Senate race or gubernatorial race.

19. During the 2000 election cycle, twenty-four percent (24%) of the primary and runoff races were decided by less than five percentage points with many races being decided by less than one percent (1%). A similar number of runoff and primary races held in 2002 state election cycles were decided by less than five percentage points.

20. The Libertarian Party failed to garner enough ballot support in the 2000 general election to retain political party status and is no longer considered a political party under Oklahoma statutes. Thus, the Libertarian Party does not have the ability or authority to conduct primary and runoff elections or place a candidate designated as a Libertarian on a ballot in Oklahoma under 26 O.S. §§ 1-104 and 1-109.

REASONS FOR GRANTING THE PETITION

FIRST QUESTION

In its opinion, the Tenth Circuit Court of Appeals incorrectly determined that the State of Oklahoma must allow a political party, if that party so chooses, to open its partisan primary and runoff elections to any registered voter, regardless of whether the voter is a member of that particular political party, registered as an independent or registered as a member of another political party. That opinion is in direct conflict with this Court's directives in *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 107 S. Ct. 544, 93 L. Ed. 2d 514 (1986) and *Rosario v. Rockefeller*, 410 U.S. 752, 93 S. Ct. 1245, 36 L. Ed. 2d 1 (1973). In addition, the Court of Appeals incorrectly interpreted this Court's decision in *California Democratic*

Party v. Jones, 530 U.S. 567, 120 S. Ct. 2402, 147 L. Ed. 2d 502 (2000) that while a state may require a party's candidates to be selected by primary elections, that a state may not, to any extent, mandate how to control the manner in which the party chooses its candidates within the framework of that election.

In *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 224, 107 S. Ct. 544, 93 L. Ed. 2d 514, n. 13 (1986), this Court gave guidance as to the outcome of a request such as the one presented in this case. However, this is the first opportunity for this Court to reinforce or clarify its language in *Tashjian*. This case is also a matter of great public concern as almost one-half of the states currently have some form of a closed or semi-closed primary election.

In *Tashjian*, this Court was presented with the question of whether a state could prevent a political party from inviting independent or non-affiliated voters from voting in the Republican political party's primary election. This Court determined that because of the unaffiliated nature of the voters, a state did not have the interests protecting a political party from potential problems such as "party raiding" due to the unaffiliated nature of the invited voters and thus, could not prevent independent voters from being allowed to vote in the Republican Party's primary election, if the Republican Party so chose.

However, this Court was very careful to point out that a request such as the one made in this case to open a primary to voters registered as members of another political party, where state law prohibits such, "would raise a different combination of considerations" and "under such circumstances, the effect of one party's broadening of

participation would threaten other parties with the disorganization effects which the statutes in *Storer v. Brown*, 415 U.S. 724, 94 S. Ct. 1274, 39 L. Ed. 2d 714 (1974), and *Rosario v. Rockefeller*, 410 U.S. 752, 93 S. Ct. 1245, 36 L. Ed. 2d 1 (1973) were designed to prevent." *Tashjian*, 479 U.S. at 224, 107 S. Ct. at 561.

The guidance from that language in *Tashjian*, which the Tenth Circuit chose not to follow, indicates that where the request is to open a primary to all voters, a state has an interest and may properly be concerned about "party raiding" on the party doing the inviting as well as the affect on the other political parties from which the voters are sought. Clearly, then, it is within the State's proper exercise of authority to enact or retain reasonable legislation to limit those perceived problems. While acknowledging *Tashjian*, the Court of Appeals totally disregarded that language and direction provided in *Tashjian*. Had the Tenth Circuit followed the guidance in *Tashjian*, the appeals court would have had to find the Oklahoma statutes constitutional.

Further, the Court of Appeals totally discounted the idea of "party raiding," despite the numerous cases in which this Court has found such activity to be an actual concern for which a state has the right to attempt to prevent or at least inhibit. "Party raiding," which has been defined as the "organized switching of blocs of voters from one party to another in order to manipulate the outcome of the other party's primary election," has been found to be a legitimate occurrence for which a State has a "particularized legitimate purpose of preventing." See *Storer v. Brown*, 415 U.S. 724, 731, 94 S. Ct. 1274, 1279, 39 L. Ed. 2d 714 (1974) citing *Rosario v. Rockefeller*, 410 U.S. 752, 83 S. Ct. 1245, 36 L. Ed. 2d 1 (1973). In *Burdick v. Takushi*,, 504

U.S. 428, 439-40, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992), this Court once again recognized the interest of a state in preventing "party raiding." Not only has "party raiding" been of concern historically to this Court, the phenomenon of "party raiding" and its effect on the electoral process was also recently recognized as a continuing, legitimate concern of the state in the primary election process in *California Democratic Party v. Jones*, 530 U.S. 567, 572, 120 S. Ct. 2402, 147 L. Ed. 2d 502 (2000). In *Jones*, 530 U.S. at 572, this court, citing *Rosario v. Rockefeller*, 410 U.S. 752 (1973), again reiterated that in order to prevent "party raiding" a "state may require party registration a reasonable period of time before a primary election."

Yet the Tenth Circuit Court of Appeals ignored the realities and probabilities of "party raiding" or similar activities and dismissed the interests of a state in preventing such activity in an effort to preserve the integrity of the electoral process. The Court of Appeals determined, in spite of this Court's previous findings, that party raiding does not occur and more importantly to this case, even if it did, such activity is not a legitimate concern for the state. This ruling is clearly in contrast with this Court's express finding in *Rosario v. Rockefeller*.

Under Oklahoma law, in order to vote, an individual must register with the State of Oklahoma. That individual may register as an independent or as a member of a particular political party and may actually register to vote until twenty-four days prior to the primary elections. A person seeking to change his political affiliation may change his political party affiliation up until June 1 of the election year, approximately only seven weeks prior to the primary election. In the present case, the Respondent party and individuals did not challenge those time restrictions for

registering as members of a certain political party prior to the primary elections as being unreasonable.

However, what the Court of Appeals has done, in essence, is to strike down the prior registration requirement at the discretion of each particular political party and allow election-day registration or affiliation with a political party in Oklahoma. While election day affiliations are not unconstitutional or inappropriate, neither is such permissive action required of a state. Oklahoma has chosen not to allow election day affiliations with political parties requiring instead that a person declare his or her affiliation some time before the primary elections. In basically striking the current voter registration time restrictions by requiring the State of Oklahoma to allow a registered member of one political party to effectively change his or her political party affiliation on the day of the primary or runoff election, the requirement from the decision of the Court of Appeals runs afoul of numerous decisions of this Court finding state requirements of pre-election political affiliation to be constitutional. *Rosario v. Rockefeller*, 410 U.S. 752 (1973) and *California Democratic Party v. Jones*, 530 U.S. 367 (2000).

In *Rosario v. Rockefeller*, 410 U.S. 752, 93 S. Ct. 1245, 35 L. Ed. 2d 1 (1973), this Court upheld state mandated party registration time restrictions, which was specifically designed to prevent "party raiding" which was defined by this Court as a process in which dedicated members of one party switch to another political party in an attempt to alter the outcome of the second party's primary. Just as important to the interests of the state, the registration time restrictions also protect a political party from having its members being drawn to a second political party in a purposeful attempt to alter or even incidentally affecting

the primary elections of the first political party. As recently as 2000, this Court has noted with approval that a state may require party registration a reasonable period of time prior to any primary election. In *Jones*, this Court even cited *Rosario* with approval and failed to overturn or limit *Rosario* and the registration requirement in any way. *Jones*, 530 U.S. at 572, 120 S. Ct. at 2407.

Incredibly, and in spite of the teachings of this Court, the Tenth Circuit Court of Appeals totally discounted what effect the Respondents' request for a party-option open primary could have on the remaining political parties and those parties' primary and runoff elections. Those possible effects are, however, a consideration for the state in passing legislation and for the Court in ruling on the appropriateness of such legislation.

Statistics presented to the trial court and the appellate court showed that nearly 24% of the state, county and local primary and runoff elections during the 1996, 2000 and 2002 election cycles were decided by five percent (5%) or less. A number of those races were decided by less than one percent (1%). To require a state to allow one political party, at that party's discretion, to open its primary and runoff elections to members of other political parties would create the instability which this court has ruled a state has the right to try to prevent.

This potential to alter primary elections of another political party, either purposefully or accidentally, is precisely the type of effect which this Court in *Rosario* determined was of valid concern and interest to the state. It is also that potential effect on a state's elections which this Court expressed concern over in *Tashjian*.

As the Tenth Circuit Court of Appeals decision striking down the Oklahoma statutes is contrary to the decisions of this Court and is erroneous, this Court should grant certiorari, address the issues as under *Tashjian v. Republican Party of Connecticut* and reverse the judgment of the Tenth Circuit Court of Appeals.

SECOND QUESTION

While the right to vote is a most fundamental right, neither the right to vote in any manner or the right to associate for political purposes are absolute. *Burdick v. Takushi*, 504 U.S. 428, 433, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992). It is axiomatic that a State has a responsibility in structuring and monitoring the election process. *California Democratic Party v. Jones*, 520 U.S. 567, 572. This necessarily includes reasonable regulation over the political parties and their primary elections.

However, the Court of Appeals basically determined that this Court's decision in *California Democratic Party v. Jones* requires a state in all partisan primaries to forego any regulation of a political party and requires the state to allow a political party to make its own determination as to which voters the party will allow to vote in its primary. In other words, a state is required to make its partisan primaries and runoff elections "party-option" open primaries. Such extension of the decision in *California Democratic Party v. Jones* is erroneous. The decision in *Jones* went to the issue of whether a state could require or force a political party to have its candidates chosen by all voters, not just party members.

This Court should grant certiorari to address the issue of whether *California Democratic Party v. Jones* is to be read to require all states to enact open primary laws or whether the case is limited to "blanket primaries" and the free acceptance of outside voters voting in a political party's primary election.

THIRD QUESTION

Where the burden on associational rights is severe, the challenged regulation must be narrowly tailored to address a compelling state interest. If, however, the burden is less severe, a lesser exacting review is appropriate. See *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358, 117 S. Ct. 1364, 137 L. Ed. 2d 589 (1997). As the Tenth Circuit Court of Appeals noted in its opinion in this case but then failed to follow, not every burden that a state statute or regulation imposes on associational rights in relation to election laws is a severe restriction requiring strict scrutiny. See *Burdick v. Takushi*, 504 U.S. 428, 433, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992).

In the decision at the trial court level, the district court concluded that the burdens placed on the associational rights of the Respondents were not severe and applied the balancing test per this Court's decisions in *Timmons*, *Burdick* and *Rosario*. However, the Tenth Circuit determined that the restrictions imposed were sufficiently severe to require strict scrutiny merely because the statute places some limitations on who may vote in a political party's primary election which in turn restricts the political party's ability to define the group of voters that may vote in its primary elections.

The determination that the restrictions imposed by the state statute are severe restrictions on political association thereby requiring a compelling state interest is erroneous. The burdens imposed are not severe burdens on Respondents.

Nothing in the Oklahoma statutes prevents a recognized political party from conducting primary elections. Nothing prevents a voter registered with one political party from timely registering with another political party and voting in that party's primary and runoff elections. Nothing prevents a registered voter from voting in the primary election for the political party for which the voter has registered. Nothing in the challenged Oklahoma statute locks a voter into an undesirable political party, deprives a voter of his right to associate with the political party of his choice, or denies the voter the opportunity to change party affiliations so long as the voter acts within the reasonably allotted time frame.

As the burdens on the associational rights are not severe, the proper test which should have been applied by the Tenth Circuit was the balancing test of *Timmons* and *Rosario*. Under that standard, the challenged statutes would be viewed as constitutional. The Tenth Circuit applied the incorrect standard of review resulting in an erroneous decision by the Court of Appeals.

This Court should grant certiorari to address the appropriate standard of review in this case.

CONCLUSION

This Court should grant certiorari to review the Tenth Circuit's decision: hold that the challenged statutes do not violate the First Amendment rights of any political party or registered voter; reverse the decision of the Tenth Circuit Court of Appeals and direct that judgment be entered on behalf of the Petitioners.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

ANDREA L. BEAVER; FLOYD TURNER; MINELLE L. BATSON; MARY Y. BURNETT; MICHAEL L. SEYMOUR; TERRY L. BEAVER; ROBERT T. MURPHY; SHARON LYNN ATHERTON; ROGER BLOXHAM; STEVE GALPIN; RICHARD P. PRAWDZIENSKI; MICHAEL A. CLEM; WHITNEY L. BOUTIN, JR.; CHRISTOPHER S. POWELL; CHARLES A. BURRIS; and the LIBERTARIAN PARTY OF OKLAHOMA a/k/a Libertarian Political Organization,

Plaintiffs-Appellants,

v.

MICHAEL CLINGMAN, Secretary of the Oklahoma State Election Board; GLO HENLEY, Chairman of the Oklahoma State Election Board; KENNETH MONROE, Vice Chairman of the Oklahoma State

No. 03-6058

Election Board; THOMAS E. PRINCE, Member of the Oklahoma State Election Board; and the OKLAHOMA STATE ELECTION BOARD,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Oklahoma (D.C. No. CIV-00-1071-F)

James C. Linger, Tulsa, Oklahoma for Plaintiffs-Appellants.

Wellon B. Poe, Assistant Attorney General, Oklahoma City, Oklahoma for Defendants-Appellees.

Before **KELLY**, **LUCERO**, and **O'BRIEN**, Circuit Judges.

(Filed Apr. 6, 2004)

LUCERO, Circuit Judge.

This case presents issues at the intersection of two Supreme Court cases concerning the associational rights of political parties in the context of primary elections. Oklahoma's election statutes currently provide for a semi-closed primary system, in which a party may invite only its own party members and registered voters designated as Independents to vote in its primary. Along with registered voters of the Republican and Democratic parties, the Libertarian Party of Oklahoma (the "LPO") filed a § 1983

action, alleging that the Oklahoma election statutes regulating primaries violate their rights to freedom of political association and free speech by preventing the LPO from inviting members of other parties to vote in its primary elections.

The district court found the Oklahoma statutes to be constitutional. Because we conclude that the election laws impermissibly violate the LPO's associational rights, we exercise jurisdiction pursuant to 28 U.S.C. § 1291 and **REVERSE**.

I

Several types of primary systems exist in the United States.[1] Oklahoma's statute regarding primaries provides that:

> A. No registered voter shall be permitted to vote in any Primary Election or Runoff Primary Election of any political party except the political party of which his registration form

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[1] In a "closed primary," there is a separate primary ballot for each party, and no cross-over voting is allowed. In other words, a registered Republican can vote only in the Republican primary. A "semi-closed primary," which resembles the closed primary, permits a party to invite independents to vote in the party's primary if it so chooses. In an "open primary" system, all voters, regardless of party affiliation, are able to choose the primary in which they vote. Finally, a "blanket primary" system allows each voter to choose in which primary he or she will vote for each separate office. A "party-option open primary," which is at issue in this case, is a variation of the "open primary." In a party-option open primary, a party may choose either to open its primary to registered independents or voters from other parties or to restrict its primary to only voters of its own party.

> shows him to be a member, except as otherwise provided by this section.
>
> B.
>
> 1. A recognized political party may permit registered voters designated as Independents . . . to vote in a Primary Election or Runoff Primary Election of the party.

Okla. Stat. tit. 26, § 1-104. By the statute's terms, a political party in Oklahoma may allow Independents to vote in its primary and runoff elections, but a party may not invite voters registered with other parties to vote in its primary.

Having exercised its statutory option to allow Independents to vote in its primaries, the LPO would also like to invite all registered Oklahoma voters, regardless of their political affiliations, to participate. The LPO has decided that such an action would help it reach out to Libertarian-oriented voters of other political affiliations, thereby producing a more viable Libertarian candidate. The LPO initially asked the Secretary of the Oklahoma State Election Board for permission to invite all registered voters to participate in its primaries for the 2000 election cycle, and the Secretary denied the request. After announcing the same intention for the 2004 election cycle and being denied again, the LPO filed suit in federal district court. It claimed that the First Amendment's guarantee of free association gave it the right to invite all registered voters, regardless of political affiliation, to vote in its primaries; it sought a permanent injunction to enjoin the Oklahoma State Election Board from enforcing the state election statutes. If granted such an injunction, the

LPO suggested that Oklahoma would become a party-option open primary state, allowing each party the option of opening its primary to registered voters of other parties.

Finding that the LPO had standing to bring the suit, the district court proceeded to weigh the character and magnitude of the burden imposed on the LPO's rights protected by the First and Fourteenth Amendments against the interests set forth as justifications by the state. It concluded that the burden of the statute on the LPO was not a severe one and accordingly analyzed whether any of Oklahoma's proffered interests were sufficiently important to justify the burden. Though it found unavailing Oklahoma's interests in avoiding voter confusion, administrative difficulties, "swamping," and "raiding,"[2] the district court concluded that the state's interest in "preserving the political parties as viable and identifiable interest groups, insuring that the results of a primary election . . . accurately reflect the voting of the party members" (R. at 68-69) was sufficiently important for the state to prevail.

II

We review the district court's findings of fact for clear error. Fed.R.Civ.P. 52(a). "A finding is 'clearly erroneous'

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[2] Swamping is defined as the control of a minor party's candidate selection by voters affiliated with other parties; it was described by the Supreme Court in *California Democratic Party v. Jones*, 530 U.S. 567, 578 (2000). Raiding is similarly defined and gives non-members of a minor party the ability to overtake the minor party as a flag of convenience, thus affecting the ideology of the ticket representatives of the party. *Id.*

when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) (citation omitted). Our review of questions of law, on the other hand, is de novo. *See Elder v. Holloway*, 510 U.S. 510, 516 (1994). "[T]he difference between a *de novo* review of a record and a review under the clearly erroneous standard is significant," *Ocelot Oil Corp. v. Sparrow Indus.*, 847 F.2d 1458, 1464 (10th Cir. 1988); in de novo review, "no form of appellate deference is acceptable," *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991).

A

Because Oklahoma statutes currently recognize the LPO as a political organization rather than a political party, we must first determine whether the LPO has standing to bring a suit to enjoin laws that restrict political parties. In Oklahoma, party status depends on statutory requirements; specifically, a group may attain party status during even-numbered years by getting a petition signed by five percent of the number of people who voted in the last general election. Okla. Stat. tit. 26, § 1-108. Having regularly completed these requirements in even-numbered years, the LPO has consistently and cyclically achieved party status. In order to *maintain* party status until the following election cycle, however, the party must achieve ten percent of the total votes cast for certain offices. Okla. Stat. tit. 26, § 1-109. If a party fails to achieve the required ten percent, it loses its status as a party and becomes a "political organization" until it is able to regain party status through the mechanisms described in § 1-108. Because the LPO has never achieved the

required ten percent, it consistently has lost its party status in years following elections. Therefore, over the last two decades, the LPO has managed to temporarily attain party status in the few months surrounding the elections but has not maintained it during the off years.

Our Article III standing jurisprudence requires that an actual controversy exist [sic] at all stages of litigation, and that the parties to the litigation all have a personal stake in its outcome. Because the LPO's status was that of a political organization rather than a political party when it brought the instant suit, there exists some doubt as to the LPO's standing to challenge a law that regulates political parties. As to the injury requirement, the LPO must demonstrate that the Oklahoma primary election statutes injure or threaten to injure the LPO. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The district court found that "[t]he LPO is an active organization with political plans for the 2004 election cycle." (R. at 23.) In addition, the LPO has been on the Oklahoma ballot in every presidential election from 1980 to 2000 and had primary elections in 1980, 1996, and 2000.

Moreover, we allow claims when plaintiffs contest "wrongs capable of repetition yet evading review." *See Rosario v. Rockefeller*, 410 U.S. 752, 756 n.5 (1973); *see also Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 514-515 (1911). One area in which the Supreme Court has applied this exception frequently is election law. In *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969), for example, the Court allowed plaintiffs to challenge a state law that required a certain number of signatures to place an independent candidate's name on the ballot. There, the Court concluded that the case was not moot because plaintiffs might be expected to seek similar access to the ballot in the future,

and thus the wrong was capable of repetition yet evading review.

Similarly, in *Norman v. Reed*, 502 U.S. 279 (1992), the Court allowed a plaintiff to challenge a ballot-access law. Explaining why it allowed the challenge despite the fact that the elections had already taken place, the Court stated that "[t]here would be every reason to expect the same parties to generate a similar, future controversy subject to identical time constraints if we should fail to resolve the constitutional issues that arose in 1990." *Id.; see also First National Bank of Boston v. Bellotti*, 435 U.S. 765, 774 (1978) (allowing plaintiffs to challenge a law prohibiting corporations from spending money in elections because the issue would likely arise in future elections).

The injury of which the LPO complains is similarly capable of repetition yet evading review. Both of the necessary elements are present. With respect to the injury's tendency to evade review, as explained above, it has been impossible to this point for the LPO to maintain its party status for more than a period of a few months. Equally apparent is the likelihood that the injury will be repeated. Although the LPO was not a political party at the time of its suit, it has a consistent record of demonstrating the ability to achieve party status. Moreover, the LPO intends to petition to regain full political party status for the 2004 election cycle, and thus it is likely that there will be a primary election with various LPO candidates competing for the right to stand for election. Indeed, "[t]here would be every reason to expect the same parties to generate a similar, future controversy subject to identical time constraints if we should fail to resolve the constitutional issues." *Norman*, 502 U.S. at 288. Accordingly, we conclude that the LPO has standing to bring the instant suit.

B

Turning to the merits of the appeal, the LPO's claim requires us to consider the impact of the Oklahoma election laws upon its rights to free association and speech under the First and Fourteenth Amendments. To this end, we must balance the state's authority to regulate elections with the freedom of political parties to choose those with whom they will associate. The Constitution grants the states the power to legislate the "Times, Places, and Manner of holding Elections for Senators and Representatives," Art. I, § 4, cl. 1, and states have parallel control over state elections. However, this general power alone "does not justify, without more, the abridgment of fundamental rights, such as the right to vote, or, as here, the freedom of political association." *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986) (citation omitted).

The nature of the constitutional rights at stake in the instant case is axiomatic; "[t]he freedom of association protected by the First and Fourteenth Amendments includes partisan political organization." *Id.* at 214; *see Elrod v. Burns*, 427 U.S. 347, 357 (1976) (plurality opinion); *Buckley v. Valeo*, 424 U.S. 1, 15 (1976). In this context, our conception of the freedom of association is not simply an acknowledgment that individuals should be free to join or not join a party. The associational rights of political parties are distinct; indeed, "[f]reedom of association means not only that an individual voter has the right to associate with the political party of her choice, but also that a political party has a right to identify the people who constitute the association." *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 229 (1989) (citations omitted).

More recently, the Supreme Court reiterated:

> In no area is the political association's right to exclude more important than in the process of selecting its nominee. That process often determines the party's positions on the most significant public policy issues of the day, and even when those positions are predetermined it is the nominee who becomes the party's ambassador to the general electorate in winning it over to the party's views. . . . [Thus we acknowledge] the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party select[s] a standard bearer who best represents the party's ideologies and preferences.

California Democratic Party v. Jones, 530 U.S. 567, 575 (2000) (citations omitted). Moreover, the Supreme Court has recognized that party "enrollment or public affiliation with the Party itself is merely one element in the continuum of participation in Party affairs, and need not be . . . the most important." *Tashjian*, 479 U.S. at 215. In accordance with this precedent, the LPO claims that the Oklahoma statutes burden its right to determine the bounds of its association in its quest for political success.

Having articulated the associational rights at stake, we must assess the degree of the burden imposed on those rights by the current Oklahoma election laws. To determine whether a state election law's burden on associational rights is impermissible:

> a court . . . must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights.

Anderson v. Celebrezze, 460 U.S. 780, 789 (1983). More recently, the Supreme Court clarified that if the burden is severe, the regulation must be narrowly tailored and advance a compelling state interest; on the other hand, if we determine the burden to be less severe, then important regulatory interests are generally enough to justify the regulation. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358-59 (1997); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

We must therefore determine the magnitude of the burden that the Oklahoma statutes place on the LPO.[3] Of course, not every burden that state regulations impose on associational rights in the election law context is a severe one. *See, e.g., Burdick*, 504 U.S. at 432-34 (concluding that Hawaii's ban on write-in voting was not entitled to strict scrutiny). The Court has applied intermediate scrutiny, for

[3] This task is somewhat complicated by the fact that prior to *Burdick*, the Court had not specifically articulated the need for a court to base its analysis on whether the burden imposed by an election statute on constitutional rights was a "severe" one. Thus, many cases do not use that terminology. In such prior cases, however, the Court either generally was explicit in employing strict scrutiny or intermediate scrutiny to evaluate the burdens imposed by election statutes on associational rights. We thus rely on the type of scrutiny employed as a useful proxy for purposes of determining whether the Court viewed the particular burden as severe (if it applied strict scrutiny) or less substantial (if it used intermediate scrutiny).

example, when the law's restrictions were chiefly administrative. *See, e.g., Rosario*, 410 U.S. at 760-62 (employing intermediate scrutiny in evaluating a New York law that required voters to enroll in a political party by a cutoff date).

However, when states have statutorily restricted parties from defining the bounds of their own association, the Court has tended to employ strict scrutiny. *See, e.g., Jones*, 530 U.S. 567, 582 (2000); *Eu*, 489 U.S. 214, 225 (1989) (requiring California's election provisions prohibiting parties from endorsing candidates in primaries to be narrowly tailored to serve a compelling state interest); *Tashjian*, 479 U.S. at 225 (1986); *Democratic Party of the United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 124 (1981) (applying strict scrutiny when Wisconsin attempted to force the Democratic Party to accept its system for selecting delegates to the national party convention); *Cousins v. Wigoda*, 419 U.S. 477, 489 (1975) (using strict scrutiny to analyze whether Illinois' interest in determining the delegates at its primaries trumped parties' associational rights); *but see Timmons*, 520 U.S. at 358-59 (employing intermediate scrutiny when analyzing Minnesota's prohibition of fusion candidacies).

Most instructive to our present analysis are *Tashjian* and *Jones;* the facts in the case before us place it squarely between those two cases. In *Tashjian*, the Court considered Connecticut's election statutes, which provided for an entirely closed primary system. *Tashjian*, 479 U.S. at 211. In other words, only voters registered with a particular party could vote in that party's primary; even independents could not vote in Connecticut's primaries. *Id.* Like the LPO in the instant case, the Republican Party in *Tashjian* asserted that Connecticut's election statutes violated its

First Amendment freedom of association rights by restricting it from inviting certain registered voters to assist it in selecting its standard-bearer. *Id.*

The Supreme Court explained that in order to trump the Republican Party's associational rights in this context, Connecticut's regulation would need to be narrowly tailored to advance a compelling interest. *Id.* at 217. Deciding that none of Connecticut's asserted interests met strict scrutiny, the Court held that a state could not restrict a party from inviting independent voters to participate in its primary election absent a compelling state interest.[4] *Id.* at 229.

Almost two decades later in *Jones*, the Court analyzed California's "blanket primary" system, in which parties were required to allow voters to choose the primaries in which they wanted to vote. *Jones*, 530 U.S. at 570. As directed by *Timmons*, the Court analyzed the burden imposed by the California regulations and concluded that it was severe. *Id.* at 581-82. Accordingly, it required California to demonstrate that its regulations were

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[4] Footnote 13 of *Tashjian* is relevant:

> Our holding today does not establish that state regulation of primary voting qualifications may never withstand challenge by a political party or its membership. A party seeking, for example, to open its primary to all voters, including members of other parties, would raise a different combination of considerations. Under such circumstances, the effect of one party's broadening of participation would threaten other parties with the disorganization effects which the statutes in *Storer v. Brown*, 415 U.S. 724 (1974), and *Rosario v. Rockefeller*, 410 U.S. 752 (1973), were designed to prevent.

479 U.S. at 224 n.13. This case poses such circumstances.

narrowly tailored to serve a compelling interest; concluding that none of the interests were sufficiently compelling, the Court held that California's primary system impermissibly violated parties' associational rights – more specifically, their ability to choose the group of people who selected their candidates. *Id.* at 586.

This case falls between *Tashjian* and *Jones*. Whereas *Tashjian* concluded that states could not restrict parties from allowing independent voters to vote in their primaries, and *Jones* held that states could not compel parties to allow voters from other parties to vote in their primaries, the instant case asks whether it is permissible for states to forbid parties from allowing registered voters from other parties to participate in their primaries.[5]

The similarities among *Tashjian*, *Jones*, and this case prove useful in our analysis, as they demonstrate that state regulations can impair associational rights either by compelling political association as in *Jones*, or by precluding political association as in *Tashjian*. More generally, in both cases the Supreme Court considered statutes that directly affected a political party's freedom to set the boundaries of the group of voters it would invite to help it

[5] One of our sister circuits had occasion to consider a question similar to the one before us. In *Cool Moose Party v. Rhode Island*, the First Circuit analyzed Rhode Island's election statute, which like Oklahoma's, provided for a semi-closed primary system. 183 F.3d 80, 82-83 (1st Cir. 1999). The First Circuit held that Rhode Island's semi-closed primary system impermissibly violated the associational rights of the Cool Moose Party. That case is somewhat distinguishable from the instant case, because Rhode Island apparently asserted only an interest in protecting the Cool Moose Party from raiding and swamping. Concluding that those interests did not trump the party's associational rights, the First Circuit held that Rhode Island's primary system was unconstitutional.

select its standard-bearer. To this end, the Court explained that a state generally may not "prevent the parties from taking internal steps affecting their own process for the selection of candidates." *Tashjian*, 479 U.S. at 224.

When read together, the clear and unavoidable implication of *Tashjian* and *Jones* is that a state generally may not restrict the ability of a political party to define the group of citizens that will choose its standard-bearer.[6] That conclusion dictates the terms of our present analysis, for among *Tashjian*, *Jones*, and the instant case runs a connecting thread. In each of the three cases, the regulation at issue restricted the options of parties seeking to define the scope of their associational rights. Faced with the prospect of such burdens in *Tashjian* and *Jones*, the Supreme Court employed strict scrutiny. Given the similarities among the cases, we are compelled to exercise similar vigilance here. Because we conclude that the burden in the instant case is a severe one, we proceed to analyze whether the regulations are narrowly tailored to serve a compelling state interest. *Jones*, 530 U.S. at 586.

Oklahoma sets forth the following four state interests in support of its current primary election statutes: (1) protecting the LPO from "swamping" and "raiding"; (2) preventing voter confusion; (3) minimizing administrative difficulties; and (4) promoting and protecting "the integrity of the election process," which includes "preserving the political parties as viable and identifiable interest groups,

[6] Analyzed in the context of related cases such as *Eu* and *La Follette*, moreover, it is apparent that the Court closely scrutinizes almost all state regulations that disrupt the decision making processes of the parties.

insuring that the results of a primary election . . . accurately reflect the voting of the party members, and prevention of confusion or misleading of the general electorate to the extent that the voting public often relies on party labels to make their choice." (R. at 68-69.)

With respect to Oklahoma's interest in protecting the LPO from "raiding" and "swamping," the Supreme Court has concluded that it is not for the state to determine what is in the best interests of a political party, explaining that "even if the State were correct, a State, or a court, may not constitutionally substitute its own judgment for that of the Party." *La Follette*, 450 U.S. at 122. Even though it employed only intermediate scrutiny in analyzing Oklahoma's interests, the district court in the instant case rejected the asserted interest of protecting the LPO. We agree that Oklahoma may not substitute its judgment for that of the LPO, and thus that its interest in protecting the LPO from itself is not sufficiently compelling to justify the burden on the LPO's associational rights.

As to Oklahoma's interests in avoiding voter confusion and administrative difficulties, whether such interests could ever be sufficiently compelling to justify a severe burden in any instance is a question that we need not decide. The district court found that on the record before it, the state had not offered sufficient facts to demonstrate even a substantial possibility of either confusion or administrative problems. With respect to voter confusion, it found that the LPO's exhibits clearly showed that "simple rules for voting eligibility can be posted at polling places when the primary and runoff elections are conducted," (R. at 75), thus eliminating the possibility of confusion. We owe deference to the district court on these findings of fact

nd conclude that the findings were not clearly erroneous. *See Anderson*, 470 U.S. at 573.

Regarding the specter of administrative problems raised by Oklahoma, the district court found that Oklahoma had introduced into the record "no basis for a finding that the implementation of a party-open primary system would create insuperable administrative burdens." (R. at 76.) We are unable to locate any evidence in the record that administrative difficulties would ensue under the LPO's proposed system; therefore, we conclude that the district court's finding that Oklahoma failed to show that administrative problems would occur if it implemented the LPO's proposed primary scheme was not clear error. *See Anderson*, 470 U.S. at 573.

Thus, we turn finally to Oklahoma's asserted interest in "protecting the integrity of the political process . . . [by] preserving the political parties as viable and identifiable interest groups, [and] insuring that the results of a primary election . . . accurately reflect the voting of the party members." (R. at 68-69.) This interest might be separated into two distinct interests – preserving political stability as a general matter, and protecting the non-LPO parties from the "poaching" of their voters by the LPO.

As to Oklahoma's general interest in political stability, the Supreme Court held in *Timmons* that though states may not "completely insulate the two-party system from minor parties' or independent candidates' competition and influence," 520 U.S. at 367, a state's interest in the stability of its political system is strong. In the ballot access context, moreover, the Court described a state's interest in political stability as "not only permissible, but compelling." *Storer v. Brown*, 415 U.S. 724, 736 (1974).

We grant that a state has a compelling interest in political stability as a general matter, but our task is to examine whether "*in the circumstances of this case*, [that interest is] compelling." *Jones*, 530 U.S. at 584. In *Jones*, for example, California asserted state interests in promoting fairness, affording voters greater choice, increasing voter participation, and protecting privacy. The Court recognized that theoretically, those interests might be compelling; however, it explained that the determination of whether they were compelling in any particular case was "not to be made in the abstract, by asking whether fairness, privacy, etc., are highly significant values; but rather by asking whether the *aspect* of fairness, privacy, etc., addressed by the law at issue is highly significant." *Id.*

In *Eu*, California asserted that its regulation forbidding parties from endorsing candidates was justified by its compelling state interest in political stability. Although conceding that a state's interest in political stability was compelling as a general matter, the Court held that California had not demonstrated that the interest was compelling in the circumstances of that case. It explained that "[m]aintaining a stable political system is, unquestionably, a compelling state interest. California, however, never adequately explains how banning parties from endorsing or opposing primary candidates advances that interest." *Eu*, 489 U.S. at 226 (citation omitted).

Our determination of whether Oklahoma's interest in political stability is sufficiently compelling in the instant case begins with the Supreme Court's comparison of the statute in *Storer*, 415 U.S. at 736, which considered a California statute forbidding a ballot position to an independent candidate who "had a registered affiliation with

[a] political party at any time within one year prior to the immediately preceding primary election," to Connecticut's closed primary system in *Tashjian*, the latter of which is much more closely analogous to the Oklahoma regulations at issue. The Court articulated:

> The statute in *Storer* was designed to protect the parties and the party system against the disorganizing effect of independent candidacies launched by unsuccessful putative party nominees. This protection [was] undertaken to prevent the disruption of the political parties from without, and not, as in this case, to prevent the parties from taking internal steps affecting their own process for the selection of candidates. . . . The Party's determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution.

Tashjian, 479 U.S. at 224 (citation omitted).

On its face, the Court's language suggests that Oklahoma's interest in protecting the integrity of the political process is insufficiently compelling. After all, the regulation at issue here "prevent[s] the parties from taking internal steps affecting their own process for the selection of candidates." *Id.* However, *Tashjian* specifically disclaimed in footnote 13 that such a conclusion necessarily followed from its holding, suggesting that a case like the one before us would "raise a different combination of considerations . . . [by] threaten[ing] other parties with [] disorganization effects." *Tashjian*, 479 U.S. at 224 n.13.

We are mindful that footnote 13 of *Tashjian* counsels caution; in so proceeding, however, we ultimately conclude

that Oklahoma's interest on this record and in the circumstances of this case is not a compelling one. Finding the interest in protecting the integrity of the political process to be sufficiently important, the district court relied on evidence that close to twenty-four percent of Oklahoma's primaries were decided by a margin of five percent or less in 2000. (R. at 63.) Those numbers in hand, it hypothesized that the LPO's proposed party-option open primary might result in enough cross-over to change some election *results* and that the integrity of the political system would thereby be undermined. (*Id.*)

We acknowledge that the district court's hypothetical might come to fruition. To be sure, some election results might change if Oklahoma switches from a semi-closed primary system to a party-option open primary system. It may be the very possibility of such change that impels the litigation before us. What is less clear, and what Oklahoma fails to demonstrate, is why a few changed outcomes in tightly contested primaries would undermine the integrity of the political process, or how somewhat altered election results would diminish Oklahoma's political stability.

Relevant to our analysis of whether Oklahoma's interest in political stability is compelling under these circumstances is that the system urged by the LPO is already in place in two states. Specifically, Utah[7] and Alaska[8] currently employ a party-option open primary, and in neither state has there been a report of instability in

[7] *See* Utah Code Ann. § 20A-9-403.

[8] *See* Alaska Stat. § 15-25-010.

the political process. We grant that a state has a compelling interest in general political stability, but the fact that neither Utah nor Alaska has collapsed under the weight of its allegedly destabilizing primary system calls into question whether Oklahoma's interest in political stability is implicated under these circumstances.

In analyzing Oklahoma's asserted interest in political stability and viability of the political parties, the district court also seemed concerned with protecting the non-LPO parties from "poaching" by the LPO. In worrying about the impact upon the associational rights of the other Oklahoma parties of allowing the LPO to open its primary to registered members of those parties, the district court explained that Oklahoma's statutes were justifiable in part because they "bar a party from poaching another party's primary election voters." (R. at 82.)

It is true, as Oklahoma asserts, that at first blush this case appears to require us to consider both the associational rights of the LPO and those of the other parties in Oklahoma, each of which is virtually certain to be affected to some degree by a change in the statute. It would effect a strange result indeed to protect some associational rights at the direct expense of others, and if allowing the LPO to choose to invite members of the Republican and Democratic parties to vote in the LPO's primary election burdened the corresponding associational rights of the Republican and Democratic parties, this would be a different case.

Such an argument, however, reflects a fundamental misunderstanding of the freedom of association, which at its core protects against state regulations that: (1) preclude association, *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984); or (2) "force[] inclusion of an unwanted person

in a group," *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000). By finding protection against poaching of other parties' voters to justify the regulations at issue, the district court effectively would add a new associational right that has to this point been absent from constitutional discussion – the ability of a group to harness and control the associational opportunities of its members.

Parties may assuredly guard their associational rights against forced inclusion of unwanted people, *see, e.g., Jones;* such an option is readily available under the LPO's proposed alternatives, for parties may choose *not* to open their primary elections to members of other parties under a party-option open primary scheme. We cannot conclude, however, that the associational rights asserted by the LPO in this case are counterbalanced by any associational rights of parties seeking to restrict the associational opportunities of their registered members.

Moreover, any concern that the Republican and Democratic parties might have for losing voters to the LPO primary elections overlooks the countervailing consideration that allowing Oklahoma's voters additional choices in primary voting promotes the associational rights of the individual voters within those parties. In this regard, to allow the LPO to invite registered voters of other parties to participate in their primaries not only advances the associational interests of the members of the LPO, but it also allows voters the benefit of choosing a primary.

III

Absent a clearer demonstration of political instability than the one present in the record before us, we conclude

that Oklahoma's current election statutes are not narrowly tailored to advance a compelling state interest. Because Oklahoma's semi-closed primary scheme does not survive our strict scrutiny, we **REVERSE** the district court's denial of the LPO's request for a permanent injunction and **REMAND** for proceedings consistent with this opinion.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ANDREA L. BEAVER; et al., Plaintiffs,	)	
vs.	)	Case No. CIV-00-1071-F
MICHAEL CLINGMAN, Secretary of the Oklahoma State Election Board; et al., Defendants.	)	

MEMORANDUM OPINION

(Filed Jan. 24, 2003)

I.
Introduction

This case presents a challenge to important aspects of the process by which Oklahomans "bring forth those persons desired by their fellow citizens to govern." *Bullock v. Carter*, 405 U.S. 134, 148-49 (1972).

Plaintiff Andrea L. Beaver is a resident of Tulsa County and a registered Democratic voter in Tulsa County, Oklahoma.

Plaintiff Floyd Turner is a resident of Tulsa County and a registered Democratic voter in Tulsa County, Oklahoma.

Plaintiff Minelle L. Batson is a resident of Oklahoma County and a registered Democratic voter in Oklahoma County, Oklahoma.

Plaintiff Mary Y. Burnett is a resident of Rogers County and a registered Republican voter in Rogers Country [sic], Oklahoma.

Plaintiff Michael L. Seymour is a resident of Tulsa County and a registered Republican voter in Tulsa County, Oklahoma.

Plaintiff Terry L. Beaver is a resident of Tulsa County and a registered Republican voter in Tulsa County, Oklahoma.

Plaintiff Robert T. Murphy is a resident of Cleveland County, a registered Libertarian voter in Cleveland County, Oklahoma, is a candidate for the Libertarian nomination for United States Representative for the 5th District of Oklahoma, and is the chair of the Oklahoma Libertarian Party.

Plaintiff Sharon Lynn Atherton is a resident of Tulsa County and a registered Libertarian voter in Tulsa County, Oklahoma.

Plaintiff Roger Bloxham is a resident of Tulsa County, a registered Libertarian voter in Tulsa County, Oklahoma, was a candidate for the Libertarian nomination for Corporation Commissioner in Oklahoma's primary election conducted on August 22, 2000, and is the Libertarian nominee for Corporation Commission in the State of Oklahoma for the general election to be conducted on November 7, 2000.

Plaintiff Steve Galpin is a resident of Oklahoma County, a registered Libertarian voter in Oklahoma County, Oklahoma, and is the Libertarian Voter Registration and Ballot Access Coordinator for the State of Oklahoma.

Plaintiff Richard P. Prawdzienski is a resident of Oklahoma County, a registered Libertarian voter in Oklahoma County, Oklahoma, and was a candidate for the Libertarian nomination for Corporation Commissioner in Oklahoma's primary election conducted on August 22, 2000.

Plaintiff Michael A. Clem is a resident of Tulsa County, a registered Libertarian voter in Tulsa County, Oklahoma, and is a candidate for the Libertarian nomination for United States Representative from the 1st District of Oklahoma.

Plaintiff Whitney L. Boutin, Jr. is a resident of Cleveland County, a registered Libertarian voter in Cleveland County, Oklahoma, was the leading candidate for the Libertarian nomination for Corporation Commissioner in Oklahoma's primary election conducted on August 22, 2000. Plaintiff Boutin alleges that he withdrew from that candidacy in order to avoid a run-off election because all Oklahoma voters would not be permitted to vote in that run-off election and in order to save taxpayers money which would otherwise be expended on a run-off election which would not be conducted in the manner that the Libertarian Party of Oklahoma desired.

Plaintiff Christopher S. Powell is a resident of Oklahoma County, a registered Libertarian voter in Oklahoma County, Oklahoma, and is a candidate for the Libertarian nomination for the State House of Representatives in District 100.

Plaintiff Charles A. Burris is a resident of Tulsa County and a registered Libertarian voter in Tulsa County, Oklahoma.

Each of the individual plaintiffs are citizens of the State of Oklahoma and are registered voters of the State of Oklahoma who wished to vote in the LPO primary election in Oklahoma on August 22, 2000 and who wish to vote in any future LPO primary or run-off elections conducted in Oklahoma.

Plaintiff the Libertarian Party of Oklahoma (styled in the caption as "a/k/a Libertarian Political Organization") is, for reasons which are discussed below, not currently recognized in the State of Oklahoma as a political party. It is recognized in the statutory "political organization" category. The Libertarian Party of Oklahoma is sometimes referred to in this order as LPO.

Defendant Michael Clingman is the Secretary of the Oklahoma State Election Board. In that capacity, Secretary Clingman is responsible for administering the election and voter registration laws of the State of Oklahoma. Secretary Clingman has supervisory authority over all county election boards, has responsibility to promulgate, repeal or modify such rules or regulations as he deems necessary to achieve and maintain uniformity in the application, operation, and interpretation of state and federal election laws and to maximize correctness, impartiality, and efficiency in the administration of those election laws. Secretary Clingman is the chief state election official responsible for coordination of state responsibilities under the National Voter Registration Act of 1993.

Defendant Glo Henley is the chairman of the defendant Board.

Defendant Kenneth Monroe is the vice-chairman of the defendant Board.

Defendant Thomas E. Prince is a member of the defendant Board.

The defendant Board is a state board organized under the laws of the State of Oklahoma to operate and perform such duties as are prescribed by law for the purpose of overseeing elections conducted by the state.

Plaintiffs have brought this action under 42 U.S.C. § 1983 (and other statutes), alleging that certain Oklahoma election statutes violate plaintiffs' First and Fourteenth Amendment rights to freedom of political association and free speech. Specifically, plaintiffs challenge 27 O.S. § 1-104(A) and § 1-104(B)(4) as statutes which impermissibly prevent a recognized political party in Oklahoma from opening up its primary and run-off elections to all Oklahoma registered voters regardless of those voters' political party affiliation. Plaintiffs seek a judgment declaring these statutory provisions unconstitutional and request injunctive relief prohibiting defendants from enforcing these provisions. 28 U.S.C. § 2201, 2201.

Defendants assert that this action is moot and, on the merits, deny that plaintiffs are entitled to any declaratory or injunctive relief. The court has concluded, for the reasons which are set forth at length in this memorandum opinion, that this action is not moot. The court has also concluded that, although some of the justifications offered by the state for the existing primary election system are unpersuasive, the plaintiffs have not established that they are entitled, as a matter of constitutional right, to imposition of a party-option open primary election system in Oklahoma.

II.
Stipulated Facts[1]

The parties have stipulated that the following facts are true. Accordingly, the court finds the following stipulated facts (¶¶ 1-36), as drafted by the parties, to be established without further proof:

1. All parties are properly before the court.

2. All parties have been correctly designated.

3. Venue is proper in this court.

4. In the year 2000, the filing period for political party nominations in the State of Oklahoma was on July 10, 11, and 12, 2000.

5. In the year 2000, the filing deadline for contesting a political party's candidates in the State of Oklahoma was by July 14, 2000, at 5:00 p.m.

6. In the year 2000, the political party primary election in the State of Oklahoma was held on August 22, 2000. In-person absentee voting began August 17, 2000.

7. In the year 2000, the run-off election in the State of Oklahoma was held on September 19, 2000.

8. In the year 2000, the general election in the State of Oklahoma was held on November 7, 2000.

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[1] To the extent that any of the matters contained in the stipulation (or in the facts which are found by the court, in part III) are legal, rather than factual, the court regards them as conclusions of law. Some uncontested aspects of Oklahoma election law are recited in the stipulated facts (part II) and in the facts found by the court (part III). Those legal matters are treated as facts because they provide some of the factual backdrop for the contested legal issues.

9. At present, an Oklahoma voter may only register to vote as Republican, Democratic, Reform, Libertarian, or Independent.

10. Only Oklahoma voters registered as Republicans may vote in the Republican Party primary election. This is by designation of the Oklahoma Republican Party.

11. Only Oklahoma voters registered as Democratic may vote in the Democratic Party primary election. This is by designation of the Oklahoma Democratic Party.

12. The Reform Party has allowed Oklahoma voters who are registered as Reform or Independents to vote in the Reform Party primary election. This is by designation of the Oklahoma Reform Party. However, the Reform Party has never had a primary or run-off election contest in the State of Oklahoma.

13. The Libertarian Party, pursuant to Oklahoma statutes, allows Oklahoma voters who are registered as Libertarian or Independents to vote in the Libertarian Party primary election. This is by designation of the Oklahoma Libertarian Party. The Libertarian Party would like to allow all Oklahoma voters, regardless of their political affiliation, to vote in Libertarian Party primary elections.

14. On May 31, 2000, the Voter Registration and Ballot Access Coordinator for the Libertarians in the State of Oklahoma turned in a designation to the Secretary of the Oklahoma State Election Board notifying the Oklahoma State Election Board that the Libertarian Party of Oklahoma consented to voting by all registered Oklahoma voters – whether they were Libertarian, Independent, Republican, Democratic, or Reform – to

vote in the Libertarian primary and run-off elections in the State of Oklahoma for the year 2000.

15. On May 31, 2000, Lance Ward, then Secretary of the Oklahoma State Election Board, accepted the Libertarian Party of Oklahoma's request that Independents could vote in the Libertarian Party primary and run-off elections in the year 2000, but did not accept said designation from the Libertarian Party of Oklahoma as to permitting Republican, Democratic, Reform, or any other recognized political party or political association voters voting in the Libertarian Party primary and run-off elections for the State of Oklahoma for the year 2000.

16. On June 21, 2000, the Libertarian Party of Oklahoma was notified that it had achieved political party status in the State of Oklahoma pursuant to OKLA. STAT. tit. 26, § 1-108. Prior to June 21, 2000, the Libertarian Party of Oklahoma was recognized as a political organization pursuant to OKLA. STAT. tit. 26, § 1-109(B).

17. There were 141 registered Libertarian Party voters in the State of Oklahoma as of November 5, 1996.

18. In the year 1996, the Libertarian Party of Oklahoma permitted Independent voters to vote in the Libertarian primary election conducted on August 27, 1996. The total vote cast in the Libertarian primary election for United States Senator on August 27, 1996, was 2,940 votes. Since only Libertarians and Independents could vote in the Libertarian Party's primary, and since there were no more than 141 registered Libertarian Party voters, the vote in the Libertarian Party's primary election on August 27, 1996, for United States Senator, means that at least 95% of the voters casting votes in the aforesaid

Libertarian Party primary election were Independent voters.

19. There are currently more than 2,100 voting precincts in the State of Oklahoma. Pursuant to OKLA. STAT. tit. 26, §§ 2-123 and 1-128.1, each precinct must have a minimum of three officials working an election, totaling more and 6,300 precinct workers working each election.

20. Oklahoma statutes require that the Oklahoma Election Board provide training for all members and employees of each county election board every two years. In addition, each precinct official is to receive in-person training every two years. The training conducted by the State Election Board and each respective County Election Board for the 2000 election cycle has already been completed.

21. There were 360 registered Libertarian Party voters in the State of Oklahoma as of June 30, 2000.

22. In the year 2000, there was no political party primary election conducted for the Reform Party in Oklahoma.

23. In the year 2000, the only statewide political party primary election conducted in the State of Oklahoma on August 22, 2000, involved the Libertarian Party primary for Corporation Commissioner.

24. There were three candidates for the Libertarian nomination for Corporation Commissioner in Oklahoma at the primary election to be conducted on August 22, 2000, to-wit: Richard Prawdzinski of Edmond, Oklahoma; Whitney L. Bootin, Jr. of Norman, Oklahoma; and Roger Bloxham of Tulsa, Oklahoma.

25. There were no statewide primary elections for the Republican or Democratic parties of Oklahoma for the primary election held on August 22, 2000.

26. In the year 2000, the Republican Party held primary elections in the State of Oklahoma on August 22, 2000, for United States Representative for Districts 1, 2, 4, and 5, but not in Districts 3 and 6.

27. In the year 2000, the Democratic Party held primary elections in the State of Oklahoma on August 22, 2000, for United States Representative for Districts 1, 2, and 6, but not in Districts 3, 4, and 5.

28. There were several primary and runoff elections conducted by the Republican and Democratic parties in various State Senate and State House of Representative districts in Oklahoma in 2000 as well as local county and municipal races.

29. Preparation and setup for the 2000 primary election ballots began on July 13. Lance Ward, then Secretary of the Oklahoma State Election Board, expected ballot proofing to begin no later than July 18 and ballot printing for the 2000 primary to begin no later than July 20.

30. The Libertarian Party of Oklahoma has passed By-laws and Resolutions which permit all registered Oklahoma voters – whether they be Republican, Democratic, Reform, Independent, or Libertarian – to vote in any primary or run-off election conducted by the Libertarian Party in any election in the year 2000 or in any future primary or run-off election conducted in the State of Oklahoma.

31. If the Libertarian Party of Oklahoma were allowed to open its primary election to all voters at the individual voters choice, each voter would only be able to receive one ballot selection in order to cast his or her vote.

32. The Libertarian Party of Oklahoma has been on the Oklahoma ballot in every presidential election from 1980 through 2000, and has had primary elections in 1980, 1996, and 2000.

33. There were 770 registered Libertarian voters in the State of Oklahoma as of January 15, 2001.

34. The Libertarian Party of Oklahoma is currently recognized as a political organization in the State of Oklahoma pursuant to OKLA. STAT. tit. 26, § 1-109(B).

35. There were 286 registered Libertarian voters in the State of Oklahoma as of November 1, 2002.

36. In the year 2004, the primary election will be held on August 24, 2004, the run-off election will be held on September 21, 2004, and the general election will be held on November 2, 2004.

The parties also stipulated that the following factual matters, though not admitted, would not be contested at the trial:

37. The Libertarian Party of Oklahoma feels that it would be advantageous to it as a political party and important to its members and all voters of Oklahoma if their rights to political association and political speech pursuant to the First and Fourteenth Amendments to the United States Constitution were furthered by opening up

the Libertarian Party primary and run-off elections to all Oklahoma voters regardless of political affiliation.

38. The Libertarian Party of Oklahoma and its members feel that opening up of the Libertarian Party of Oklahoma's primary and run-off elections would help them reach out to Libertarian oriented voters of other political affiliations, produce a more viable Libertarian candidate for the general election, create favorable publicity for the Libertarian Party, and encourage further expansion and growth of the Libertarian philosophy. It has also been the experience of most Libertarians that many individuals not formally affiliated with the Libertarian Party share Libertarian views on certain issues so as to support the advancement of common political objectives favored by the Libertarians.

39. There are a number of voters in the State of Oklahoma who are registered in political parties other than the Libertarian Party who wished to vote in the Libertarian Party's primary and run-off elections in the State of Oklahoma in the year 2000 and wish to vote in future primary and run-off elections to be conducted by the Libertarian Party.

40. The Libertarian Party of Oklahoma intends to seek political party recognition in the State of Oklahoma, pursuant to OKLA. STAT. tit. 26, § 1-108, and run candidates for elective office in the election to be conducted in Oklahoma in the year 2004.

41. There are a number of Libertarians who are interested in running in Libertarian Primaries to be conducted in the State of Oklahoma in the year 2004. Among these individuals are Roger Bloxham, Lynn Atherton, and Robert Murphy, all of whom desire to seek the

Libertarian nomination for U.S. Senator from Oklahoma in the year 2004.

III.
Additional Findings

On the basis of the evidence before it, the court makes the following additional findings of fact:

1. The factual matters set forth in ¶¶ 37-41 in part II, above, to which the parties do not stipulate but which were not contested at trial, are well supported by the evidence and are accordingly found by the court to be true.

2. The Libertarian Party has been an active and energetic, albeit largely unsuccessful participant in Oklahoma politics for more than 20 years. As is set forth elsewhere in the court's findings, at various times, the Libertarian Party has enjoyed official statutory party status. At other times, the status of the Libertarian Party has receded to that of a political organization.

3. In 1980, the Libertarian Party attained full party status (e.g., statutory political party status) for the first time. Once a party attains recognized political party status, it must satisfy statutory requirements in order to retain that recognition and thus to retain its place on the ballot. Specifically, a recognized political party whose nominee for governor or nominees for electors for president and vice-president (as the case may be) fail to receive at least 10% of the total votes cast for those offices at a general election will loose its status as a recognized political party. The erstwhile political party becomes a statutory political organization. Oklahoma law provides (26 O.S. § 1-109) that status as a political organization will

terminate four years after the date that the political party ceases to be recognized or when the political organization regains recognition as a political party (whichever is earlier). The 10% retention requirement is a significant hurdle for minor party ballot access in Oklahoma.

4. The Libertarian Party has lost its recognized status by virtue of its failure to satisfy the retention requirement set forth in Oklahoma law, as applied to the 2000 election cycle.[2] The Libertarian Party intends to regain full political party status for the 2004 election cycle. Several Libertarian Party candidates plan to run for United States Senate in 2004, making it likely that there will be a primary election with various Libertarian Party candidates competing for the right to stand for election to the United States Senate in the November, 2004 general election.

5. Although the Libertarian Party has not participated in every primary election and has not fielded candidates for all offices in any primary election, the Libertarian Party has been a fairly consistent participant in Oklahoma's primary elections. Robert T. Murphy, who has been active in Libertarian Party politics, has been a Libertarian Party candidate for elective office several times. He ran for United States Senate in 1980 and 1984 as a Libertarian candidate. He ran as a candidate for Congress in 2000. (It was not necessary for Mr. Murphy to run in a primary election in those three elections.) Mr. Murphy intends to run for United States Senate in 2004.

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[2] For a full description of Oklahoma's ballot retention requirements, see *Coalition for Free and Open Elections v. McElderry*, 48 F.3d 493, at 495-96 (10th Cir. 1995).

Mr. Murphy wishes to have Republicans and Democrats eligible to vote at the primary election stage of his intended 2004 effort to win a United States Senate seat.

6. A Libertarian Party primary election for the United States Senate seat is likely in 2004.

7. In 2000, Richard Prawdzienski ran for Oklahoma Corporation Commissioner as a Libertarian Party candidate. In that election, the Libertarian Party allowed independent candidates to vote in its primary.

8. Floyd Turner, an Oklahoma resident and registered Democrat desired to vote in the Libertarian primary election for Oklahoma Corporation Commissioner in the 2000 election cycle. Of course, the law precluded him from doing so. Mr. Turner does not intend to relinquish his status as a registered Democrat in order to avail himself of the opportunity to vote in the Libertarian primary.

9. The court finds, on the basis of the LPO's consistent record of political activity in Oklahoma and on the basis of the uncontroverted testimony with respect to the plans of the LPO and of the individuals who plan to run as Libertarian candidates, that it is likely that the LPO will once again regain recognized party status and will, accordingly, participate in the 2004 election cycle. The court further finds that it is likely that there will be competition among Libertarian candidates for office which will necessitate a primary election for the Libertarian Party. The court accordingly finds that it is likely that the issues which are presented by the LPO's expressed intent to invite voters affiliated with other parties to participate in its primary are likely to recur in the 2004 election cycle.

10. Compared to other states, it is relatively easy, in Oklahoma, for an independent candidate for public office to gain access to the ballot but relatively difficult for a political party to establish and maintain party status (with resultant ballot access).

11. There are at least four types of primary elections in the United States (perhaps with some variations within these general species). The four general types of political primary may be referred to as the closed primary, the semi-closed primary, the open primary and the blanket primary. In the closed primary election system, there is a separate primary ballot for each party. No crossover voting is allowed. In the semi-closed primary system,[1] there is a separate primary ballot for each party, but independents are permitted to vote in a primary election if the party chooses to permit voting by independents. In the open primary system, all voters may, regardless of registration or party affiliation, choose the primary in which they will vote in that primary election. In the blanket primary system, each voter can choose which primary he or she will vote in for each separate office. Within this nomenclature,[1] Oklahoma has a semi-closed primary. The primary election format to which the plaintiffs assert they are constitutionally entitled will be referred to as the party-option open primary.

12. A party-option open primary can help a minor party get established, at least in a broad electoral sense. Nationally, there are 23 states which effectively have open

[1] There are, of course, variations within these categories. For instance, a nominally closed primary system may not be very exclusive in practice if registered party affiliation can easily be changed before the primary election.

primaries. Utah, Alaska and Rhode Island (Rhode Island by virtue of the decision in *Cool Moose Party v. State of Rhode Island,* 183 F.3d 80 (1st Cir. 1999)) are the only states which have party-option open primaries.

13. In the 23 open primary states, there were 41 Libertarian primary elections between 1976 and 2002. In 40 of the 41 Libertarian primary elections, the Libertarian candidates garnered 1% or less of the total votes cast in the primary.

14. In 2002, the Utah Democratic[4] Party opened its contested primary in the First Congressional District to members of all parties. Even though the Democrats have only about 20% of party registration in Utah, 24% of the voters chose to vote in the Democratic primary. Thus, Democrats attracted a fair number of Republicans and Independents. This is an example of the base-broadening effect which the LPO seeks to establish in Oklahoma.

15. It is the political judgment of the Libertarian Party of Oklahoma that the advantages of a party-option open primary outweigh the disadvantages of that format. The Libertarian Party has no plans to change its bylaws in this respect.

16. It is plaintiffs' position that the Libertarian Party is entitled, as a matter of constitutional right, to declare its primary open or closed and to make the same choice with respect to any runoff election which may ensue. In turn, a voter who accepted the invitation to cross

[4] At trial, it was suggested that the official name of the Utah Democratic Party is the Utah Democrat Party. The readily available reference sources do not confirm this. *See* www.utdemocrats.org.

over in the primary would be afforded the same choice at the runoff stage, as long as the party in whose runoff he elected to vote had opted to open its primary.

17. In an open primary, the candidates must appeal to the voters of all parties. Plaintiffs' political science expert, Richard Winger, acknowledged that voters in an open primary are, in the aggregate, less likely than they would be in a closed primary to support the ideals of the parties in whose primaries they choose to vote on primary election day.

18. The defendant, Michael Clingman, Secretary of the Oklahoma State Election Board since August, 2001, testified that voter confusion and "raiding" would result from a party-option open primary system. Voter confusion would result from the application of varying rules on primary election day, depending upon the choices made by the parties as to whether to open their primaries. According to Mr. Clingman, the raiding phenomenon, which would occur with a party-option open primary, would put one party in a position to affect the choice of the candidates of another party.[5] Under Oklahoma election law, a

[5] Mr. Clingman's definition of raiding coincides with Justice Stewart's. *Rosario v. Rockefeller,* 410 U.S. 752, 760 (1973). Raiding has also been described as "malicious crossover voting." *California Democratic Party v. Jones,* 530 U.S. 567, 579 (2000). The reality of raiding as a phenomenon existing other than in the minds of supporters of closed primaries is a matter of conjecture. The Supreme Court has noted that the existence of raiding as an electoral phenomenon has never been conclusively proven. *Democratic Party of U.S. v. LaFollette,* 450 U.S. 107, 122, n. 23 (1981). However, as conjectural as raiding, in the strict sense, may be, it can be taken for granted that crossover voting can have noticeable effects. In Wisconsin's open Democratic presidential primary in 1964, 26 % of the votes were cast by crossover voters. Seven percent of Democratic voters voted for Alabama Governor George C.

(Continued on following page)

political party cannot determine what individuals will file for office under its banner. Thus, with the phenomenon of raiding, Mr. Clingman suggests that a party-option open primary would give non-members of a minor party the ability to overtake the minor party as a flag of convenience, thus affecting the ideology of the ticket representatives of the party. In this sense, crossover voting would, Mr. Clingman suggests, dilute party identity and impair party identification.

19. Lance Ward, the former Secretary of the Oklahoma State Election Board (having served in that capacity for 13 years) also expressed concern about the voter confusion which he asserts would result from a party-option open primary. Mr. Ward believes that the potential for confusion resulting from differences between parties in any given election would be compounded by differences in treatment of voters from one election to the next.

20. The legislation permitting registered Independents to vote in primary elections was enacted in 1987 (presumably in the wake of the *Tashjian* decision in 1986), but was first implemented in the 1996 general election. Mr. Ward confirmed that this was a relatively simple change to implement.

21. Mr. Ward suggested that the potential for voter confusion would be maximized if a party opted to open its primary but close its runoff. He raised the possibility that this system could result in the casting of a number of

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Wallace, but 62 % of crossovers voted for him. *Id.* at 118, n. 19. Open primary advocates have gone so far as to identify a category of crossovers who are "principled crossovers," *id.* at 124, n. 27, a categorization which requires remarkable powers of discernment.

irregular ballots sufficient to make the outcome of a primary election mathematically uncertain. As described by Mr. Ward, this problem results from changing the ballots voters get from election to election, perhaps within a three week period (between a primary and a runoff primary).

22. The court is not persuaded that significant voter confusion would result from a party-option open primary. As indicated by plaintiffs' exhibits 1 and 2, very simple rules for voting eligibility can be posted at polling places when the primary and runoff elections are conducted.

23. In *Atherton v. Ward,* 22 F.Supp.2d 1265 (W.D. Okla. 1998), the Libertarians sued the State Election Board for the purpose of establishing a right to register as Libertarians even though the LPO was not then a recognized political party in Oklahoma. The defendants predicted that if the Libertarians were granted the relief they sought, the result would be administrative problems amounting to a "parade of horrors," in Judge Alley's words. 22 F.Supp.2d 1268. At the trial of the case at bar, Lance Ward, the lead defendant in *Atherton,* could offer no evidence that his predictions, in *Atherton,* of administrative problems had come true. Likewise, Mr. Ward could not cite any instance, from any of the states which have party-option open primaries, in which difficulties were encountered in informing the voters as to which parties' primary elections and which parties' primaries were closed. This court finds in this case, as did Judge Alley in *Atherton,* that the granting of the relief sought by the plaintiffs would not result in any substantial, let alone insuperable, administrative burden.

24. The extent to which crossover voting (e.g., Republicans and Democrats voting in the Libertarian primary) would occur if Oklahoma had a party-option open primary is highly speculative. For the same reason, the effect of that crossover voting on the "donor" parties is a highly speculative matter.

25. Mr. Clingman asserts, in substance, that the state has an interest in seeing to it that the parties' candidate selections are the result of the choices of persons of like ideology and that, under the Oklahoma election scheme, the safety valve is the ease with which a candidate can run as an independent.

26. Mr. Ward also cited as an evil resulting from a party-option open primary system the possibility that major party candidates might tailor their positions to attract voters who might otherwise abandon their party's primary. Another evil which would result from a party-option open primary system, according to Mr. Ward, is "swamping." Swamping is the control of a minor party's candidate selection by voters affiliated with other parties. The phenomenon of swamping was vividly described by the Supreme Court in *California Democratic Party v. Jones*, 530 U.S. 567, 578 (2000), where the Court noted that, in California's blanket primary, the total number of votes cast for party candidates in some races was more than double the total number of registered party members.

27. Because of Oklahoma's liberal filing rules, the state's professed concern for protection of the political identities of the parties is not fully expressed in Oklahoma's election rules. For instance, in the 2002 election in Oklahoma's third district, no Democrat filed against the Republican incumbent. Consequently, at the end of the

filing period, a radical left wing or right wing candidate could have filed for Congress as a Democrat (assuming he had registered as a Democrat before the deadline; see 26 O.S. 2001 § 5-105), conferring upon himself status as the Democratic Party standard bearer.

28. In terms of the precise issues in this case relating to the effect of implementation of a party-option open primary in Oklahoma, the expert testimony was both highly interesting and highly speculative, although both of the retained experts ventured some opinions that were plausible, at least in the sense that they were not counter-intuitive. The experts also testified to some historical facts which were informative for this court and which may likewise be informative for a reviewing court. In addition to the testimony of their retained expert, the defendants presented expert testimony from Lance Ward, a former Secretary of the State Election Board, and from the defendant Michael Clingman, the current Secretary.

29. The opinions of Richard Winger, called by the plaintiffs, are summarized in defendants' exhibit 12. The opinions of Dr. Robert Darcy, called on behalf of the defendants, are summarized in defendants' exhibit 8. Mr. Winger and Dr. Darcy were well-qualified to address the matters which they addressed as expert witnesses.

30. Elsewhere in this Memorandum Opinion, the court discusses the issues and contentions which are essentially irrelevant to the court's disposition of this case and has likewise discussed those matters which are decisive. In light of the court's parsing of the issues, point-by-point resolution of the conflicts in the expert testimony is not necessary.

31. Although the court relies principally upon the affidavit of Richard Winger and on the transcript of his trial testimony as a record of the theories he expounded in this case, some aspects of his testimony deserve comment here. Mr. Winger testified persuasively that, under Oklahoma's ballot access rules, it is relatively difficult for minor parties to get established in Oklahoma politics. He pointed out that no Libertarian or member of any other minor party has been elected to any Oklahoma public office in more than 25 years and that, in more than 25 years, no minor party has had more than two years and five months of continuous legal recognition. This, of course, has consequences with respect to party membership. Party membership is, for instance, much higher in Kansas, where the Libertarian Party has been able to maintain its recognized status continuously.

32. Mr. Winger also testified persuasively that opportunistic candidacies, by candidates who do not share a party's ideology but join the party so that they can get on the ballot, are relatively unlikely in Oklahoma because, in Oklahoma, it is quite easy for independent candidates (for offices other than president) to get on the ballot. They simply need to pay the filing fee. For that reason, it is significantly less likely in Oklahoma that opportunistic candidacies, with resultant electoral raiding, will occur.

33. Mr. Winger also described in some detail the differences between Oklahoma law and California law with respect to independent candidacies and ballot access for minor parties. In California, according to Mr. Winger, it is much easier for minor parties to gain ballot access and much more difficult for independent candidates to run for public office. On this basis, Mr. Winger explained in

understandable terms the reasons for which the Libertarians' strategy in Oklahoma, with respect to the party-option open primary, is markedly different from the Libertarians' strategy in California (as demonstrated by the opinion in *California Democratic Party v. Jones*).

34. Dr. Robert Darcy, defendants' academic expert, opined that swamping has already occurred in Oklahoma in that independent voters have vastly outnumbered registered Libertarians in the Libertarian primaries. Dr. Darcy is also of the opinion that permitting Republicans and Democrats to vote in the Libertarian primary would diminish if not destroy the Libertarians' control of selection of their own political candidates. He estimated that 2-4% of Republican and Democratic voters would opt to vote in the Libertarian primary. He also opined that opening the Libertarian primary to Republican and Democratic voters would have an effect on the primaries from which the crossover voters were lured.

35. Thus, according to Dr. Darcy, modification of Oklahoma's primary election structure, which is presently designed to eliminate swamping and raiding, would have an effect on the group from which the crossover voters came as well as the group which they joined. The effect on the forsaken party's primary would depend upon the closeness of the primary, the nature of the race and the voting characteristics of the crossover group of voters. These matters are, of course, highly speculative.

36. Dr. Darcy offered some predictions as to how some registered Republicans and Democrats might behave as voters if offered the opportunity to vote in the Libertarian primary while retaining their Republican or Democratic registration. One of the major premises underlying

Dr. Darcy's testimony was that the Libertarian primary elections would likely become essentially meaningless by virtue of the numbers of Republicans and Democrats who might cross over to vote in a Libertarian primary if invited to do so. The impact of these prognostications is substantially reduced, however, by the fact that, under Oklahoma election law, all registered Libertarians are purged from the voter rolls as Libertarians when the Libertarian Party, as it typically does, forfeits its recognized party status following the presidential election cycle. Thus, it is highly likely that the ranks of independents and, indeed, of registered Republicans and Democrats, contain numerous voters who sympathize with the LPO but who simply do not wish to go through the motions of re-registering every time they are purged from the rolls.

37. Of course, the focal point of the experts on both sides was the question of the effect, in Oklahoma, of implementation of a party-option open primary in which the LPO would opt to invite voters affiliated with other parties to vote in the Libertarian primary. This is a scenario which has not occurred in Oklahoma. Consequently, the experts' predictions are based entirely upon their assumptions and hypotheses. As has been noted, the experts' opinions as to the effect of implementation of a party-option open primary are speculative. Some well-designed and undoubtedly very expensive exit polling would have reduced the speculativeness of the experts' predictions. However, in light of the court's conclusions as to the dispositive legal issues in this case, there was and is no real need for detailed predictions, with a high degree of certainty, as to the practical effect of implementation of a party-option open primary. As has also been noted, some of the historical facts which have been cited by the experts

are of interest and are, of course, more reliable than predictions as to future voter behavior. One notable example is the fact, testified to by Dr. Darcy and shown by his report, that, in the August, 2000 primary election in Oklahoma, nearly 24% of the races were decided by a margin of 5% or less. Dr. Darcy also testified that the 2002 primary election results, in terms of closeness of the margins of victory, were essentially the same. This suggests to the court, and the court finds, that the institution of a party-option open primary format in Oklahoma as sought by the plaintiffs would likely affect the outcome of some primary elections. Viewing the matter from the perspective of the minor parties, the evidence does not persuade the court that the presumed evils of raiding and swamping would be highly likely to occur. Raiding and swamping are phenomena which, in the classic examples, affect the minor party which chooses to open its primary to voters affiliated with other parties. On the other hand, the historical information which is in hand with respect to the number of very close major party primary races in Oklahoma indicates convincingly that, at the margin, implementation of a party-option open primary system would affect Oklahoma primary elections in a way not permitted or intended by the system currently in place.

IV.
Conclusions of Law

A. Preliminary Matters.

1. Mootness.

The LPO is an active organization with political plans for the 2004 election cycle. It is likely that LPO candidates will vie for the Libertarian nomination for United States

Senate, and perhaps for other offices, in the 2004 cycle. This is a controversy which is capable of repetition yet evading review. Therefore, this case is not moot. *See Democratic Party of the United States v. Wisconsin,* 450 U.S. 107, 115, n.13; *Storer v. Brown,* 415 U.S. 724, 737, n.8 (1974); *American Party of Texas v. White,* 415 U.S. 767, 770, n.1; all quoting or citing *Rosario v. Rockefeller,* 410 U.S. 752, 756, n.5 (1973).

2. Standard of Review.

Constitutional challenges to specific provisions of a state's election laws . . . cannot be resolved by any litmus-paper test to separate valid from invalid restrictions. *Tashjian v. Republican Party of Connecticut,* 479 U.S. 208, 213 (1986) (quoting the rule from *Anderson v. Celebrezze,* 460 U.S. 780, 789 (1983), in turn quoting *Storer v. Brown,* 415 U.S. 724, 730 (1974)).

A court must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the state as justifications for the burden imposed by its rule. In passing judgment, the court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. *Tashjian,* 479 U.S. at 214 (quoting *Anderson,* 460 U.S. at 789).

Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less

exacting review, and a state's important regulatory interests will usually be enough to justify reasonable nondiscriminatory restrictions. *Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 358 (1997) Nor are elaborate, empirical verifications of the weightiness of the state's asserted justifications required. *Id.* at 364.

The mere fact that a state's system creates barriers tending to limit the field of candidates from which voters might choose does not of itself compel close scrutiny. *Burdick v. Takushi,* 504 U.S. 428, 433 (1992) (quoting *Bullock v. Carter,* 405 U.S. 134 (1972). When rights are subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance. But when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the states' important regulatory interests are generally sufficient to justify the restrictions. *Burdick v. Takushi,* 504 U.S. 428, 434 (1992) (quoting *Anderson,* 460 U.S. at 788; applying this balancing standard to evaluation of Hawaii's ban on write-in ballots).

Faced with the inherent tension between a political party's right of association and a state's power to regulate elections, the Supreme Court has endorsed a flexible standard of review. *Cool Moose Party v. State of Rhode Island,* 183 F.3d 80, 82 (1999).

There must be more than a minimal infringement on the rights to vote and of association before strict judicial review is warranted. *Nader v. Schaffer,* 417 F.Supp. 837, 849 (1976), *aff'd* 429 U.S. 989 (1976) (upholding, as reasonably related to accomplishment of legitimate state goals, Connecticut statute providing that no person may

vote in a party primary unless the voter is on the last-completed enrollment list of that party).

These rules are succinctly summarized in "Elections-Nominations and Primary Elections: The Supreme Court Finds that California's 'Blanket Primary' Violates Political Parties' First Amendment Right of Association," 77 N.D. L. Rev. 827, 830 (2001), as follows:

> "The Supreme Court has developed a test to be used when determining whether an election law infringes upon a political party's First Amendment right of freedom of association. When determining the constitutionality of a state election law, a court has to weigh the character and magnitude of the burden imposed on the rights protected by the First and Fourteenth Amendments with the interests set forth as justifications by the state. A court has to consider the extent to which the state's interests made the burden necessary. The level of review depends on the weight of the burden: if the burden is severe, the regulation must be narrowly tailored and advance a compelling state interest, but if it is a lesser burden, important regulatory interests will generally be enough to justify reasonable, nondiscriminatory restrictions."

(Quotations and citations omitted.)

The following Tenth Circuit authorities are also helpful to the court's understanding of the standard by which it evaluates plaintiffs' challenge to Oklahoma's election statutes. *Campbell v. Davidson*, 233 F.3d 1229, 1233 (2000) (applying the "flexible standard of *Burdick*" to find that Colorado's election law requirement that unaffiliated candidates must be registered to vote was not a valid exercise of the state's regulatory power); *Campbell v.*

Buckley, 203 F.3d 738, 742-46 (10th Cir. 2000) (including an informative discussion and determining that the "flexible approach" referred to as "the balancing test," rather than the strict scrutiny test, applied to a [sic] evaluate an unsuccessful challenge to Colorado's ballot initiative law); and *Coalition for Free and Open Elections, Prohibition Party v. McElderry*, 48 F.3d 493, 496-97 (10th Cir. 1995) (applying the "balancing test" to determine an unsuccessful challenge to the validity of an Oklahoma statute which banned write-in voting in presidential and vice-presidential elections).[6]

B. The Merits.

As is discussed above, the court must first consider the character and magnitude of the asserted injury to the plaintiffs' First and Fourteenth Amendment associational rights. The court is then required to identify and evaluate the justifications put forward by the state for the burdens complained of. The court will generally discuss the

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[6] *Cf. Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989), a case in which the Supreme Court characterized the challenged California statutes (which banned primary endorsements and imposed restrictions on internal policy governance of political parties) as statutes which "directly [affect] speech which is at the core of our electoral process and of the First Amendment freedoms." *Id.* at 222-23. In *Eu*, the Court stated that the challenged law survived constitutional scrutiny only if the state showed that the law advanced a compelling state interest and that the statute was narrowly tailed [sic] to serve that interest. *Id.* at 222. *Eu* is distinguishable from this action. Not only are the restrictions challenged here much less burdensome than the ban challenged in *Eu*, that case measured citizens' and political parties' First Amendment interests against the state's regulatory interest; it did not measure *competing* First Amendment interests as the court must do here.

asserted injury and the proffered justifications, following which the court will analyze the matter in more detail.

1. Nature of the Asserted Injury.

The plaintiffs in this action include the LPO, as well as individuals registered as Republicans, Democrats or Libertarians. Plaintiffs assert that they "are pro-choice as to the choice to be made by political parties and individual voters on voting in political parties' primary elections. . . ." Plaintiffs' Amended Trial Brief, at 11. Going one step further than *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), and consistently with *Cool Moose Party v. State of Rhode Island*, 183 F.3d 80 (1st Cir. 1999), plaintiffs assert that Oklahoma's semi-closed primary election system unconstitutionally burdens their freedom to associate with others to advance their political beliefs. *Id.* at 12. Plaintiffs' claim is elegantly simple and facially appealing. The LPO and the Libertarians assert that they should be able to invite registered Republicans and Democrats into their primary if they choose to do so. The Republican and Democratic plaintiffs correspondingly assert that they should have the option to vote in the Libertarian primary if invited to do so. Accordingly, plaintiffs assert that Oklahoma's semi-closed primary system violates their "constitutional rights to political association and free speech." *Id.* at 17.

There is no room for doubt that the "freedom of association protected by the First and Fourteenth Amendments includes partisan political organization." *Tashjian* at 214. The First Amendment interests which are at stake here are made all the more important by the fact that the primary election is a crucial stage in biennial cycle of

political activity in Oklahoma; hence, the rights of the parties mean little if they are not protected at the primary election stage. *Tashjian* at 216. The decisions of the Supreme Court "vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party selects a standard bearer who best represents the party's ideologies and preferences." *Jones*, at 575 (internal quotation marks omitted).

This case, of course, involves a dimension which the Supreme Court noted was absent in *Tashjian*. The competing interests in the case at bar are not just those of the party and the state. We have, instead, the "different combination of considerations" which is raised by the assertion that the court should compel the state to permit the LPO to open its primary to voters affiliated with other parties as well as to independents. *Tashjian* at 224, n. 13.

2. Justifications Asserted by the State.

The defendants assert that imposition of a party-option open primary format in Oklahoma would result in voter confusion and that the resultant crossover voting would adversely affect the other parties' primaries, with possible effects on the outcome of the other parties' primary races. Amended and Supplemental Trial Brief of Defendants, at 6-7. Elaborating on its arguments, the state asserts that it has an interest in "protecting the integrity of the election process" and that that protection includes "preserving the political parties as viable and identifiable interest groups, insuring that the results of a primary election . . . accurately reflect the voting of the

party members and prevent[ion][of] confusion or misleading of the general electorate to the extent that the voting public often relies on party labels to make their choice." *Id.* at 10. In a display of gallantry not often found in modern day litigation, the state also argues at length that the LPO should lose this lawsuit for its own good. *Id.* at 11-13. The adverse effects from which the state says the LPO must be protected are swamping and raiding, as discussed above.

3. Analysis.

(a) Preliminary discussion.

In *Tashjian,* the Supreme Court held that the party's right to define its associational boundaries were impermissibly infringed by the state's prohibition on participation in the party's primary election by unaffiliated voters. *Tashjian* at 225. The case at bar presents (as did *Cool Moose*) the situation which the Tashjian Court anticipated in its footnote 13:

> Our holding today does not establish that state regulation of primary voting qualifications may never withstand challenge by a political party or its membership. A party seeking, for example, to open its primary to all voters, including members of other parties, would raise a different combination of considerations. Under such circumstances, the effect of one party's broadening of participation would threaten other parties with the disorganization effects which the statutes in *Storer v. Brown,* 415 U.S. 724 (1974), and *Rosario v. Rockefeller,* 410 U.S. 752 (1973), were designed to prevent.
>
> *Tashjian,* at 554, n. 13.

The associational rights which were decisive in *Tashjian* were tested from the opposite direction in *Jones.* In *Jones,* the Court held that California's blanket primary in which any primary election voter could, regardless of party affiliation, vote for any candidate for any office – violated the parties' right to define themselves as political associations. *Id.* at 577.

Tashjian and *Jones* provide convenient bookends for constitutional analysis, but generalizations based on those cases – regardless of which way the generalizations may cut – are treacherous. This is, in part, a result of the fact that the *party option* feature of plaintiffs' proposed format for open primaries undermines potent arguments which might otherwise be advanced in support of the challenged legislation. In this respect, *Tashjian* stands in stark contrast with *Nader v. Schaffer,* 417 F. Supp. 837 (D. Conn. 1976), summarily aff'd, 429 U.S. 989 (1976). In holding Connecticut's closed primary unconstitutional in *Tashjian,* the Court carefully noted that, in *Nader,* unlike *Tashjian,* the Republican Party *opposed* the plaintiff's effort to participate in the party's primary. *Tashjian,* at 212. The granting or withholding of a party's consent to participation in its primary by strangers is clearly significant for First Amendment purposes. Hence, many of the considerations which were decisive in *Jones,* where participation in the primary by strangers was legally compelled, have less force here. On the other hand, the case at bar affects political parties other than the party challenging the legislation in a manner and to an extent that was not present in *Tashjian,* but perhaps was anticipated in *Tashjian's* footnote 13. *Tashjian* and *Jones* thus provide a useful beginning point, but surely not the ending point, for any analysis of the issues in this case.

Tashjian and *Jones* teach that state-compelled political association (*Jones*) and state-precluded political association (*Tashjian*) can impair the associational rights guaranteed by the First and Fourteenth Amendments. These associational rights are clearly implicated in this case, because, regardless of whether it is "politically neutral," *Burdick v. Takushi,* 504 U.S. 428, 438 (1992), primary election legislation, by its very nature, regulates political behavior – it necessarily has "the effect of channeling expressive activity at the polls," *id.,* with consequent inevitable effects on the freedom of the contending political parties to advance their political goals as they see fit.

Resolution of a First Amendment challenge to the political regulation which is in question here also requires, as a preliminary matter, that the court take notice of some aspects of this case which may go far to inform an analysis of the burdens complained of by the plaintiffs and the justifications put forward by the state. As will be seen, there is more to this case than a single-axis analysis of whether we have state preclusion of political association that amounts to an unconstitutional deprivation of associational rights. Moreover, as relevant at this stage of the court's analysis, *Tashjian* and *Jones* teach, if they teach nothing else, that cases like the case at bar must be carefully analyzed in light of the totality of the circumstances presented by the state's primary election scheme (a point which is aptly illustrated by the fact that, for reasons which were satisfactorily explained by Richard Winger, an expert witness for the plaintiffs, the Republican and Democratic participation which the LPO so ardently seeks in Oklahoma was anathema to the California Libertarians in *Jones*). The court must thus "consider

the facts and circumstances behind the law," *Storer v. Brown,* 415 U.S. 724, 730 (1974), as was done, for example, in *Coalition* at 495-96, so that the constitutionality of the challenged provisions may be considered in the appropriate factual context as well as against the "backdrop of Oklahoma's other [primary election] laws." *Id.* at 496.

One highly conspicuous facet of this case has already been mentioned: the interests of other political parties are implicated here in a way which was simply not present in *Tashjian.* In *Tashjian,* the Connecticut Republican Party successfully asserted a constitutional right to invite *unaffiliated* voters to participate in its primary election. Imposition of the primary election format which was sought in *Tashjian* could have had only an indirect effect on the other political parties. None of the other parties were placed in the position of contributing voters to the Libertarian Party while maintaining a home for them on their registration rolls. In contrast, the party-option open primary format sought by the Libertarians in the case at bar would directly affect the other political parties and would make registered party affiliations significantly less meaningful in the Oklahoma primary election system.

Also significant is the fact that Oklahoma voters who are registered with a political party other than the LPO but wish to vote in the Libertarian primary can do so quite easily under the existing legislative scheme. They can change their registration to Libertarian or independent, and are entitled to do so not later than July 1 of any election year. 26 O.S. 2001 § 4-119. To be sure, the value of the option to change registration is reduced somewhat by the fact that the deadline for a change in registration falls just before the candidate filing period. 26 O.S. 2001 § 5-110. It is also true, however, that the identities of the

major party candidates (at least the viable ones) are almost always known well before the filing period begins. Voters who may be sufficiently disenchanted with the major parties to change their registration typically have ample opportunity to develop that disenchantment before the time for change of registration expires. Oklahoma's system thus imposes no substantial restrictions on the voter who may be nomadic in his political preferences. When that fact is borne in mind, it becomes apparent that the sharpest conflict presented by this case is the *party vs. party* conflict, rather than a *state vs. voter* conflict.

A final matter which is notable at this point is the role which the state plays under the legislation which is challenged in this case. Many cases in which state election laws are challenged involve *access* to the electoral competition. *See, e.g., Bullock v. Carter,* 405 U.S. 134 (1972); *Libertarian Party of Oklahoma v. Oklahoma State Election Board,* 593 F.Supp. 118 (W.D. Okla. 1984). This case, in contrast, involves the rules which govern the competition after all the contending candidates, and their political parties, have entered the field of play. In the former case, the state is a political gatekeeper – a role that assuredly invites skepticism. *See, e.g., Bullock* and *Williams v. Rhodes,* 393 U.S. 23 (1968). In this case, the state's role is more akin to that of a referee.[7] Thus, the challenged legislation is not aimed at minor parties in general, as in ballot access cases, or at the LPO in particular. As has been noted, it is politically neutral, and thus free of any

[7] This analogy may be imperfect because it may be at least arguable that the election apparatus being scrutinized in this case has been skewed as a result of nearly 100 years of two-party politics, thus compromising any claim by the state to neutral referee status.

obvious oligopolistic taint. Indeed, the prize sought in Oklahoma by the LPO – participation in the Libertarian primary by Republicans and Democrats – is that which the California Libertarians found repugnant in *Jones.* Thus we have here a nondiscriminatory restriction which the state's "important regulatory interests are generally sufficient to justify." *Burdick v. Takushi,* 504 U.S. 428, 434 (1992) (internal quotation omitted).

(b) The state's arguments based on the possibility of voter confusion and administrative difficulties, and paternalistic concerns, are unpersuasive.

Looking first to the justification which may be most quickly dismissed, the court rejects the state's argument that the semi-closed primary system should be perpetuated because the LPO would be harmed by giving it the option to open its primary. This paternalistic approach has been unequivocally rejected by the Supreme Court. Neither the state nor the court may constitutionally substitute its own judgment for that of the party as to the strategy best calculated to bring about electoral success. *Tashjian* at 554. Thus, even if the party's chosen strategy consisted of "self-destructive acts, that would not justify a state substituting its judgment for that of the party." *Eu v. San Francisco County Democratic Central Committee,* 489 U.S. 214, at 227-28 (1989). The state will fare no better with paternalistic justifications in the case at bar.

The specter of electoral raiding, as proffered by the state, is equally unpersuasive, both factually and legally. Raiding is a practice in which voters in sympathy with one party temporarily align themselves with another party so as to influence or determine the results of the other party's

primary. *Tashjian* at 219; *Rosario v. Rockefeller,* 410 U.S. 752, 760 (1973). As a factual matter, as has been discussed, the court is in a very poor position to assay the purity of the Libertarian voting electorate because the Libertarian registration rolls are periodically purged, with the result that, to an inherently unmeasurable extent, voters who have Libertarian political inclinations will either come to rest on the roll of unaffiliated voters or will register with one of the major parties for no reason other than to avoid repeatedly being purged to unaffiliated status. No instance has been cited in which, in any jurisdiction, a candidate has effectively hijacked the Libertarian Party for opportunistic reasons. The court is unable to find any significant possibility that opportunistic voters with no real allegiance to Libertarian principles would raid the Libertarian Party. (This is, of course, aside from the fact that the raiding argument is, at bottom, another paternalistic argument of the kind which has found little support from the Supreme Court.)

The state also argues that "swamping" is an evil to be avoided and that swamping would result from imposition of a party-option open primary format. Reduced to its essentials, swamping is the voting phenomenon by which a party's philosophical or political identity (or perhaps both) is lost as a result of primary election participation by non-party members in numbers vastly exceeding the number of voting party members. Referring to crossover voting in California's blanket primary in *Jones,* the Supreme Court noted that "these substantial numbers of voters who help select the nominees of parties they have chosen not to join often have policy views that diverge from those of the party faithful. *Jones,* at 578. By definition, swamping affects only minor parties whose registered

voter turnout is small in comparison to the available pool of primary election voters. Thus, if swamping is an evil to be avoided, it is an evil which affects only minor parties, in this case the Libertarian Party. Viewing the matter in this light, the court is, for the reasons discussed above with respect to raiding, disinclined to give decisive effect to an essentially paternalistic justification for Oklahoma's present semi-closed primary system.

As has been discussed, the state argues that the proposed party-option open primary format would lead to intolerable voter confusion. The court has resolved the voter confusion argument against the state on the facts (see part III, ¶¶ 21-23, above). The court will note, however, that as a legal matter, voter confusion has provided a slender reed upon which to rest a defense of primary election rules. On one hand, the state has unquestioned authority to control the election process. *Tashjian* at 217. However, this authority "does not extinguish the state's responsibility to observe the limits established by the First Amendment rights of the state's citizens." *Id.* Thus, the state's legitimate interests in preventing voter confusion and providing for educated and responsible voter decisions "in no respect make it necessary to burden the party's rights." *Id.* at 221-22 (internal quotation marks omitted). The court has no doubt that the need to avoid voter confusion would become constitutionally relevant if the court were confronted with a proposal which would clearly invite chaos on election day. We have no such situation here. The factual weakness of the state's voter confusion argument fortifies the court's conclusion that that argument is also legally without merit.

Finally, on the subject of administrative difficulties, Messrs. Ward and Clingman both alluded to administrative concerns in their testimony. The concerns voiced by Messrs. Ward and Clingman with respect to administrative difficulties are related to the voter confusion argument also advanced by the state. The essential argument is that if different voting eligibility rules applied to the various parties whose ballots would be available on primary election day, precinct-level snafus could create the situation which is the nightmare of any election official – the casting of questionable ballots in a number sufficient to render the outcome mathematically uncertain. While the court does not take lightly the suggestion that the engrafting of additional complications onto the primary election system might engender difficulties in administering that system throughout Oklahoma's 2251 precincts, the court has simply been provided no basis for a finding that the implementation of a party-option open primary system would create insuperable administrative burdens.

(c) <u>The state has adopted a politically neutral primary format which does not unconstitutionally burden the plaintiffs' First and Fourteenth Amendment Rights.</u>

As is discussed in part IV(A)(2), above, the court has concluded that because the challenged legislation is politically neutral, nondiscriminatory, and "regulatory" at least in the same sense that the write-in ban in *Burdick* was regulatory, the appropriate test is a balancing test, as was applied in *Timmons, Burdick* and *Tashjian*. The court hastens to add, however, that, on the facts of this case, application of a balancing test certainly does not foreshadow the final result. This case aptly illustrates the

Supreme Court's observation in *Timmons* that "[n]o bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms." *Timmons,* at 359.

"It is well settled that partisan political organizations enjoy freedom of association protected by the First and Fourteenth Amendments," *Eu v. San Francisco County Democratic Central Committee,* 489 U.S. 214, 224 (1989). At the heart of this right of association is the constitutionally protected "freedom to join together in furtherance of common political beliefs," *Jones,* at 574 (internal quotation omitted), which is "protected by the Fourteenth Amendment from infringement by any State." *LaFollette,* at 121.

The protected activity which is involved in this case is not mere expression in the abstract sense. It is not mere debate, as important as that can be. Instead, it is the candidate selection phase of the political cycle – "the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community." *Tashjian,* at 216. *See also, Jones* at 581 (candidate selection process is "the basic function of a political party").

Voters, as well as parties and their candidates, are also affected by Oklahoma's primary election scheme, whether it be plaintiffs' scheme or the state's. This is, to some extent, a result of the fact that "the rights of voters and the rights of candidates do not lend themselves to neat separation." *Bullock v. Carter,* 405 U.S. 134, 143 (1972). *See also, Cousins v. Wigoda,* 419 U.S. 477, 488 (1975); *Ripon Society v. National Republican Party,* 525 F.2d 567, 585 D.C. Cir. 1975); *Nader* at 845 ("An attempt to interfere with a party's ability to maintain itself is

simultaneously an interference with the associational rights of its members.")

These bedrock principles define the interests which are in play from the plaintiffs' vantage point.

With tenacity which the court cannot but admire, the LPO has struggled for more than twenty years in the courts and elsewhere in the public arena to gain a political foothold in Oklahoma. *See, e.g., Artunoff v. Oklahoma State Election Board,* 687 F.2d 1375 (10th Cir. 1982) (Libertarian Party challenge to ballot access rules); *Libertarian Party of Oklahoma v. Oklahoma State Election Bd.,* 593 F. Supp. 118 (W.D. Okla. 1984) (same); *Atherton v. Ward,* 22 F. Supp.2d 1265 (W.D. Okla. 1998) (Libertarian Party challenge to registration rules). It is now the judgment of the party's leadership (a judgment which no court may second guess, see p. 34, above) that the LAO's political ascent in Oklahoma will be facilitated by inviting members of other parties to give LPO politics a try by voting in the LPO primary without abandoning their registered party affiliation.

The LAO's freedom to implement its chosen strategy has collided with Oklahoma's semi-closed primary format. Subject to constitutional limitations and other exceptions not relevant here, it falls to the states to regulate elections. *See, e.g.* U.S. Const. Art. 1 § 4, Art. II, § 1; *Bush v. Gore,* 531 U.S. 98, 104 (2000). Even as to primaries, the role of government is unavoidable. *Burdick,* at 433 ("Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections"); *The Federalist No. 59* (1788) ("[I]t will therefore not be denied that a discretionary power over elections ought to exist somewhere."). However, as the

LPO would be quick to point out, where statutory law is concerned, the state is the creature of the parties in power, *e.g., Williams v. Rhodes,* 393 U.S. 23, 31-32 (1968), and is thus a bit suspect as a disinterested rule maker. It is necessary, therefore, to carefully evaluate those justifications for the challenged legislation which the state may plausibly offer (the court having previously discarded the implausible ones).

The right "to vote in any manner" and the right to associate for political purposes through the ballot are not absolute. *Burdick* at 433. Although the states are not permitted to "completely insulate the two-party system from minor parties' or independent candidates' competition and influence," *Timmons,* at 367, they do have a strong interest in the stability of their political systems. *Id.* at 366. The state's interest in political stability has been described as "not only permissible, but compelling." *Storer* at 736.

In *Timmons,* the Court had before it a challenge to Minnesota's anti-fusion rule, which prohibited a candidate from appearing on the ballot as the candidate of more than one party. *Timmons,* at 353-54. In a conclusion which resembles one of the LAO's arguments in this case, the Court of Appeals had held that the anti-fusion rule kept "the New Party from developing consensual political alliances and thus broadening the base of public participation in and support for its activities." *Id.* at 360 (internal quotation marks omitted). The state argued that it had an interest in avoiding voter confusion and overcrowded ballots, preventing party splintering and disruptions of the two-party system, and being able to clearly identify the election winner. *Id.* at 364. The Supreme Court held that the party's First and Fourteenth Amendment interests

were outweighed by the state's interest in enacting "reasonable election regulations that may, in practice, favor the traditional two-party system." *Id.* at 367. In dissent, Justice Stevens argued that the "true basis for the Court's holding [was] the interest in preserving the two-party system." *Id.* at 377. The majority saw no reason to quibble with this critique, and in fact embraced the proposition that, for the sake of tempering "the destabilizing effects of party-splintering and excessive factionalism," the state may nurture "a healthy two-party system" as long as there are no "unreasonably exclusionary restrictions." *Id.* at 367. It is thus clear that legislation which favors the two-party system is not, for that reason alone, on thin constitutional ice.

On the subject of the integrity of the electoral process, *Jones* teaches that state laws which may cause parties to skew their positions from those which they might otherwise take are constitutionally suspect. *Jones,* at 582. In *Jones,* the law in question was the blanket primary law which permitted any voter to vote for any candidate in any party's primary. This scheme was unsuccessfully defended by the state on the basis, among others, that the blanket primary forced the parties to moderate their positions, a justification which was emphatically rejected as "a stark repudiation of freedom of political association." *Id.* In the case at bar, the primary election format which plaintiffs assert is constitutionally *required* would have a quality which was identified as constitutionally *suspect* in *Jones*: the parties whose voters would be invited by the LAO into its primary would be induced, in an effort to retain voters who might be tempted to taste Libertarian politics without changing their registration, to skew their positions from those which they "would choose if left to their

own devices." *Id.* Of course, considerations which were influential in *Jones* must be carefully assessed for applicability to this case, because, in *Jones,* the open primaries were forced rather than optional. Hence, in *Jones,* the rules were applied to all parties whether they liked the rules or not, whereas, in the case at bar, the rule contended for by the plaintiffs would be applied to the LAO by consent and to the other parties without their consent. On this point, *Tashjian* becomes instructive. In *Tashjian,* the Court was at pains to distinguish between rules which "prevent[ed] the disruption of the political parties *from without*" and rules which "prevent[ed] the parties from taking *internal* steps affecting their own process for the selection of candidates." *Tashjian* at 224 (emphasis added). The primary election format sought by plaintiffs in the case at bar is a hybrid – it would "disrupt" other parties "from without" but would amount to an "internal step" for the LAO. The Oklahoma legislature has plainly laid down a bright-line rule as to the significance of registered party affiliation. Although this rule is at odds with the plaintiffs' preferred primary election format, the court concludes that Oklahoma's approach to primary elections embodies choices which the Oklahoma legislature was free to make without violating the First and Fourteenth Amendments.

It is clear that the "important regulatory interests," *Burdick* at 434, which may outweigh associational rights in the election law context may encompass matters of structure, stability and party integrity, as opposed to justifications, which this court has rejected, based on administrative convenience and avoidance of voter confusion. *See, e.g., Timmons* at 366-67; *Burdick* at 433-34 and 438; *Storer* at 736. In the case at bar, unlike *Jones,* granting the relief sought by plaintiffs would

impose an unwanted rule on parties other than the LAO. The state is entitled, at least in the regulatory sense which has been countenanced by the Supreme Court, to balance the political interests which are in play at the primary election stage of the election cycle by providing for a semi-closed primary. The judgments that are implicit in this format are judgments that the legislature was free to make, and it is clear under the relevant Supreme Court authorities that it is no answer to argue that the semi-closed primary format simply shores up the two-party system and values stability over the right of political association – especially where, as here, a voter who would like to try LAO politics may change his registered party affiliation only a few weeks before the primary election. (*Cf. Rosario,* where the Supreme Court declined to void the eight- to eleven-month cutoff for changes of registration for voting in New York's closed primary). Oklahoma's rules do not place burdensome requirements on the Republican and Democratic plaintiffs who, as would-be crossover voters, assert a constitutional right to participate in the primary of a party to which they do not belong (and, in the case of plaintiff Floyd Turner, a party which he emphatically refuses to join). *Jones* "stands, at least in part, for the proposition that the party's right to define its membership becomes meaningless if it cannot limit membership to those individuals who are willing to identify themselves with the party and its message." Borden, *Primary Elections,* 38 Hard. J. Legis. 263, 277 (2001).

Timmons, in which the Court upheld Minnesota's anti-fusion rule, is again instructive. Although the two

situations are not entirely congruent,[8] the fact that a state may bar one party from poaching another party's candidates without violating the First and Fourteenth Amendments plausibly suggests that the state may bar a party from poaching another party's primary election voters. The Court, in *Timmons,* answered the New Party's complaint by noting that the New Party was free to attempt to persuade the candidate to switch parties. *Id.* at 360. That practical remedy is equally available here, and would be equally efficacious in eliminating any constitutional violation which might otherwise appear. State-enforced party loyalty, or disincentives for disloyalty, may seem suspect, but they have received the sanction of the Supreme Court in cases in addition to *Storer. Cf. Nader v. Schaffer,* 417 F.Supp. 837, 847 (D. Conn. 1976), *aff'd* 429 U.S. 989 (1976): "[A] state legitimately may condition one's participation in a party's nominating process on some showing of loyalty to that party," and *Lippit v. Cipollone,* 404 U.S. 1032 (1972), affirming, without opinion, a decision upholding a statute banning primary election candidacies of those who had voted in another party's primary within the preceding four years.

The challenged provisions amount to "politically neutral regulations that have the effect of channeling expressive activity at the polls." *Burdick* at 438. Because the court has concluded that this legislation falls within the limits established by the First and Fourteenth Amendments, the court respectfully disagrees with the conclusion reached in *Cool Moose,* which was decided by the First Circuit with the benefit of Supreme Court's decision in

[8] Some concerns that were relevant in *Timmons,* but are not present in the case at bar, are discussed at 520 U.S. 365-66.

Tashjian but without the benefit of the Court's decision in *Jones*. The court in *Cool Moose* applied a balancing test, an approach with which this court agrees, as is discussed in part IV(A)(2), above. The First Circuit's comments in applying the balancing test may go far to explain the result reached by the court. The court noted arguments which could have been, but were not, made by the state in support of the Rhode Island closed primary. *Id.* at 86. The court went on to say that the state misconceived the nature of the Cool Moose Party's challenge, and expressly declined to bolster the state's feeble arguments on appeal. *Id.* at 86-88 ("We will not invoke justifications out of the whole cloth on appeal."). The court was left with "raiding" and even weaker administrative concerns as the only justifications offered to sustain the legislation, and those justifications were as unpersuasive with the First Circuit as they are with this court. None of the party integrity concerns which were decisive a year later in *Jones* were discussed.

Accordingly, balancing the interests which are at stake here, and recognizing the state's prerogatives in regulating elections even where that regulation has the effect of reinforcing party identity and shoring up the two-party system, the court concludes that the plaintiffs have not made their case, factually or legally, for imposition of a party-option open primary system in Oklahoma.

V.
Conclusion

The court commends the parties and their counsel for their outstanding presentations, both in writing and at trial. Falling, as it does, in the void between *Jones* on one hand and *Tashjian* on the other, this case invites appellate

review of the court's resolution of the difficult issues presented. By separate document, judgment will be entered in favor of the defendants.

DATED January 24, 2003.

/s/ S. P. Friot
STEPHEN P. FRIOT
UNITED STATES
DISTRICT JUDGE

42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit or equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. (R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.)

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26 O.S. § 1-104:

A. No registered voter shall be permitted to vote in any Primary Election or Runoff Primary Election of any political party except the political party of which his registration form shows him to be a member, except as otherwise provided by this section.

B. 1. A recognized political party may permit registered voters designated as Independents pursuant to the provisions of Section 4-112 of this title to vote in a Primary Election or Runoff Primary Election of the party.

2. The state chairman of the party shall, between November 1 and 30 of every odd-numbered year, notify the Secretary of the State Election Board as to whether or not the party intends to permit registered voters designated as Independents to vote in a Primary Election or Runoff

Primary Election of the party. If the state chairman notifies the Secretary of the State Election Board of the party's intention to so permit, registered voters designated as Independents shall be permitted to vote in any Primary Election or Runoff Primary Election of the party held in the following two (2) calendar years. If the state chairman of one party notifies the Secretary of the State Election Board of the party's intent to so permit, the notification period specified in this paragraph shall be extended to December 15 for the state chairman of any other party to so notify or to change prior notification. A registered voter designated as Independent shall not be permitted to vote in a Primary Election or Runoff Primary Election of more than one party.

3. Failure to so notify the Secretary of the State Election Board shall serve to prohibit registered voters designated as Independents from voting in a Primary Election or Runoff Primary Election of the party.

or

4. A group of persons seeking to form a recognized political party pursuant to the provisions of Section 1-108 of this title shall, upon filing of the petitions seeking recognition of the political party with the Secretary of the State Election Board, notify the Secretary of the State Election Board as to whether or not the party intends to permit registered voters designated as Independents to vote in a Primary Election or Runoff Primary Election of the party. If the party is recognized and the group of persons seeking recognition of the party notifies the Secretary of the State Election Board of such intention, registered voters designated as Independents shall be permitted to vote in any Primary Election or Runoff

Primary Election of the party held prior to January 1 of the following even-numbered year.

(2)

Supreme Court, U.S.
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No. 04-37

In The
Supreme Court of the United States

MICHAEL CLINGMAN, Secretary of the Oklahoma State Election Board; GLO HENLEY, Chairman of the Oklahoma State Election Board; KENNETH MONROE, Vice Chairman of the Oklahoma State Election Board; THOMAS E. PRINCE, Member of the Oklahoma State Election Board; and the OKLAHOMA STATE ELECTION BOARD,

Petitioners,

v.

ANDREA L. BEAVER; FLOYD TURNER; MINELLE L. BATSON; MARY Y. BURNETT; MICHAEL L. SEYMOUR; TERRY L. BEAVER; ROBERT T. MURPHY; SHARON LYNN ATHERTON; ROGER BLOXHAM; STEVE GALPIN; RICHARD P. PRAWDZIENSKI; MICHAEL A. CLEM; WHITNEY L. BOUTIN, JR.; CHRISTOPHER S. POWELL; CHARLES A. BURRIS; and the LIBERTARIAN PARTY OF OKLAHOMA, a/k/a LIBERTARIAN POLITICAL ORGANIZATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Plaintiffs/Respondents (the Libertarian Party of Oklahoma and individual registered Libertarian, Democratic, and Republican voters) filed suit challenging the constitutionality of Okla. Stat. tit. 26, §§1-104(A) and 1-104(B)(4), which prevented the Libertarian Party of Oklahoma (hereinafter referred to as the LPO) from inviting voters registered as members of other political parties from voting in the political party's primary and runoff elections. After the Court had turned down Respondents' request for a preliminary injunction as to the 2000 Primary Election, the Respondents filed an Amended Complaint noting that the LPO had passed by-laws and resolutions that would permit all registered Oklahoma voters to vote in any primary or runoff election conducted by the LPO in any future primary or runoff election conducted in Oklahoma for the LPO.

The current Oklahoma election law in question only permits political parties to allow voters registered in that party and Independent registered voters – if the party so chooses – to vote in the party's primary. Okla. Stat. tit. 26, §1-104. Because the LPO had run candidates in every presidential election year in Oklahoma from 1980 through 2000, and expected to do so in future Presidential elections, the party was desirous of having the issue resolved as to a party-option open primary for future elections. Specifically, the LPO and its members felt that opening up their primary and runoff elections to all registered voters in Oklahoma would help the party reach out to Libertarian-oriented voters of other political affiliations, produce a more viable Libertarian candidate for the General Election, create favorable publicity for the Libertarian Party, and encourage further expansion

and growth of the Libertarian philosophy. Also, it had been the experience of most Libertarians that many individuals not formally affiliated with the LPO share Libertarian views on certain issues so as to support the advancement of common objectives favored by the LPO. As is obvious from the Republican and Democratic Respondents in the instant case, there are a number of Oklahoma voters who are registered in political parties other than the LPO who wish to vote in the LPO's primary and runoff elections.

After a non-jury trial in the case at bar, the Trial Court found that the instant case was not moot because the LPO was likely to have primary elections in the future in Oklahoma, and, if the LPO were allowed to open its primary election to all voters at the individual voter's choice, each voter would only be able to receive one ballot selection in order to cast his or her vote. Further, the Trial Court found that a party-option open primary can help a minor party get established, the ranks of registered Independent, Republican, and Democratic voters in Oklahoma contain numerous voters who sympathize with the Libertarian Party, and the Trial " . . . Court is in a very poor position to assay the purity of the Libertarian voting electorate because the Libertarian registration roles are periodically purged, with the result that, to an inherently unmeasurable extent, voters who have Libertarian political inclinations will either come to rest on the role of unaffiliated voters or will register with one of the major parties for no reason other than to avoid repeatedly being purged to unaffiliated status." Petitioners' Pet. for Writ of Cert., App. 62.

Additionally, the Trial Court found there were 23 open primary states in the United States without party

registration, there were three states that had party registration which allowed party-option open primaries (viz.: Utah Code Ann., §20A-9-403; Alaska Stat. §15-25-010; and Rhode Island – by virtue of the decision in *Cool Moose Party v. State of Rhode Island*, 183 F.3d 80 (1st Cir. 1999)), and, in the 23 open primary states without party registration between 1976 and 2002, there were 41 Libertarian primary elections – only in one of which the Libertarian candidates garnered more than one percent of the total votes cast in all the primaries. Finally, in party-option open primaries conducted in other states where voters register with a political party (e.g., the Democratic Party in Utah in 2002), the Trial Court found that open primaries had been held without any evidence of confusion or harm.

As to Oklahoma, while 75 percent of the registered Republicans and 69 percent of the registered Democrats had not voted in their party's primary election in 2000, the Trial Court found that the extent to which cross-over voting (e.g., Republicans and Democrats voting in the Libertarian primary) would occur and the effect of the cross-over voting on the donor parties – if Oklahoma had a party-option open primary – is highly speculative, and that the Petitioners' fears for voter confusion, raiding, swamping, and administration difficulties as the result of a party-option open primary are paternalistic and not borne out by the evidence presented at trial. However, the Trial Court did find that because some primary elections of the Democratic and Republican parties in Oklahoma were decided by five percent or less of the vote, allowing some Republicans and Democrats to vote in the Libertarian Party primary might affect the outcome of the major party primaries. Therefore, the Trial Court upheld the semi-closed

primary system of Oklahoma because of the perceived effect the party-option open primary would have on other political parties and the State's justification of protecting political party integrity.

On appeal, the United States Court of Appeals for the Tenth Circuit reversed the decision of the Trial Court because the election laws in question impermissibly violated the Respondents' First Amendment rights to political association. In reaching its decision, the Tenth Circuit considered the case in conjunction with this Court's decisions in *California Democratic Party v. Jones*, 530 U.S. 567 (2000) and *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986). The Court not only used the balancing test set forth by this Court in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), but tempered its review by considering the severity of the burden placed on Respondents' rights by the election laws in question as dictated by this Court in *Burdick v. Takushi*, 504 U.S. 428 (1992) and *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997).

Petitioners timely filed a Petition for Writ of Certiorari in this Court. Because Petitioners offer no compelling reason for this Court to exercise its discretionary power to grant a Writ of Certiorari, as required by Supreme Court Rule 10, because there is no conflict in decisions between the Circuit Courts of Appeals, and because the Court of Appeals correctly applied existing law to the particular facts and circumstances in the case at bar, Petitioners' request for a Writ of Certiorari should be denied.

REASONS FOR DENYING THE PETITION

I. The Court Should Not Grant Certiorari Based on a Party's Incorrect Assertion that the Court of Appeals Committed Error.

The Justices of this Court have repeatedly stressed that this Court's certiorari jurisdiction is not merely a mechanism for the correction of perceived errors by the lower federal courts. As " . . . the Rules of this Court make plain, our certiorari jurisdiction is designed to serve purposes broader than the correction of error in particular cases." *Watt v. Alaska*, 451 U.S. 259, 275 n.5 (1981) (Stevens, J. concurring). Further, as Justice Frankfurter has written: "[C]ertiorari jurisdiction 'is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision.'" *Rogers v. Missouri P.R. Co.*, 352 U.S. 500, 531 (1957) (Frankfurter, J. dissenting), quoting "*Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251 (1916). While the Tenth Circuit in the case below did declare unconstitutional Oklahoma's ban on party-option open primaries, the opinion is in no way in direct conflict with this Court's directives in *Tashjian v. Republican Party of Connecticut, Rosario v. Rockefeller*, 410 U.S. 752 (1973), and *California Democratic Party v. Jones*, because the Tenth Circuit reached a decision based on the particular facts and circumstances set forth in the Trial Court. The Tenth Circuit noted that the record in the Trial Court below had found that both Utah and Alaska currently employed a party-option open primary system as urged by the LPO herein, and neither state had a problem with instability in its political process. *Beaver v. Clingman*, 363 F.3d 1048, 1060 (10th Cir. 2004).

The Petitioners misread the decision in *Tashjian* to mean that a party-option open primary may never be permitted. In fact, *Tashjian* did not rule on the issue of a party-option open primary as far as allowing members of other political parties to choose whether they wish to vote in their own party's primary or accept the invitation to vote in another party's primary election. As Justice Sutherland once wrote in noting that a point at issue had not been decided in a previous case: "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925). Rather, footnote 13 in *Tashjian* is mere *dicta* and simply suggests that the Court – as the Tenth Circuit did – exercise caution in considering precisely what the proof was of the compelling state interest which might make it necessary for a state to forbid a party-option open primary. Just as in *Tashjian* the State failed to make its case in the record of the Trial Court as to why the State should be able to prevent a political party from allowing Independent voters to vote in the political party's primary, the record in the case below did not support the alleged interest of the State in banning a political party from inviting registered members of other political parties to vote in the inviting political party's primary. Therefore, the Tenth Circuit was correct in its ruling based on the particular circumstances, facts, and record in the case below – as was the First Circuit in the similar case of *Cool Moose Party v. State of Rhode Island*. Rather than disregarding the language of *Tashjian* as Petitioners contend, the Tenth Circuit herein specifically followed the guidance and teaching of *Tashjian* in considering its decision.

As to *Rosario v. Rockefeller*, the Tenth Circuit commented on the concern in *Rosario* " . . . to prevent 'party raiding' which was defined by this court as a process in which dedicated members of one party switched to another political party in an attempt to alter the outcome of the second party's primary." Petitioners turn the concern in *Rosario* on its head by assuming that the party to be protected is the party from which the voters come from rather than from the party in which they are going to vote in its party primary. *Rosario* stands for the proposition that the state may properly protect a party from voters switching over to a party which does not invite them into its primary, as opposed to the instant case where the party is extending an invitation to voters of other political parties. Petitioners simply misunderstand that the danger of party raiding in *Rosario* is a danger to a party receiving new voters which only that political party is in a best position to judge whether it is a danger it wishes to be protected from. Likewise, a different issue was involved in *Storer v. Brown*, 415 U.S. 724 (1974), than in the instant case, wherein the law in question involved a political party disaffiliation requirement in order to run as an Independent candidate.

Even the Trial Court noted in its decision below, " . . . the *party option* feature of plaintiffs' proposed format for open primaries undermines potent arguments which might otherwise be advanced in support of the challenged legislation." See Petitioners' Pet. for Writ of Cert., App. 57. The Trial Court then went on to note that *Tashjian* stood in stark contrast with *Nader v. Schaffer*, 417 F. Supp. 837 (D. Conn. 1976), *summarily aff'd*, 429 U.S. 989 (1976), because in the *Nader* case, unlike in *Tashjian*, the Republican Party opposed the Plaintiff's effort to participate in

the party's primary. *Tashjian,* 479 U.S. at 212. As the Trial Court in the instant case then stated, "The granting or withholding of a party's consent to participation in its primary by strangers is clearly significant for First Amendment purposes." Petitioners' Pet. for Writ of Cert., App. 57. The Petitioners simply do not understand the fundamental right of freedom of political association " . . . which at its core protects against state regulations that: (1) preclude association, *Roberts v. United States Jaycees,* 468 U.S. 609, 622 . . . (1984); or (2) 'force [] inclusion of an unwanted person in a group.'" *Boy Scouts of America v. Dale,* 530 U.S. 640, 648 . . . (2000). *Beaver v. Clingman,* 363 F.3d at 1060-1061. Political parties do not own their members.

Finally, the decision of this Court in *California Democratic Party v. Jones* is in no way contrary to the decision of the Tenth Circuit in the case at bar. In fact, the Tenth Circuit Court of Appeals noted that the instant case was squarely between the cases of *Tashjian* and *California Democratic Party v. Jones*. Just as *Tashjian* had required the Connecticut regulation in question to be narrowly tailored to advance a compelling state interest, *Tashjian,* 479 U.S. at 217, the Tenth Circuit also noted that *Jones* required California to demonstrate that its regulations were narrowly tailored to serve a compelling state interest and on the record found that none of the interests were sufficiently compelling. *California Democratic Party v. Jones,* 530 U.S. at 581-82, 586. Rather than misreading this Court's decision in *Jones,* it is clear that the Tenth Circuit carefully considered *Jones* and *Tashjian* and looked to the record in the case below in reaching its decision.– Petitioner misstates the basis of the Tenth Circuit's decision by oversimplifying the decision and

overlooking the exact reasoning and considerations relied upon by the Tenth Circuit.

II. Petitioners Have Not Articulated a Compelling Reason to Justify Discretionary Review by this Court Because Petitioners Misunderstand the Effect of this Court's Decision in *California Democratic Party v. Jones.*

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." Sup. Ct. R. 10. "A petition for a writ of certiorari will be granted only for compelling reasons." *Id.* Petitioners have not presented any compelling reason for this Court to exercise discretionary jurisdiction in the case at bar. In search of a compelling reason for the grant of certiorari, Petitioners set up a "straw man argument" by alleging that the Tenth Circuit Court of Appeals determined that *California Democratic Party v. Jones* " . . . requires a state in all partisan primaries to forego any regulation of a political party. . . . ", and to let the political party determine " . . . as to which voters the party will allow to vote in its primary." Petitioners' Pet. for Writ of Cert., at 14.

However, a close review of the Tenth Circuit's decision below shows that Petitioners' aforesaid allegation is a gross simplification. Rather, it is clear from looking at the Tenth Circuit's decision in *Beaver v. Clingman* that the Court full well understood that blanket and open primaries are not *per se* unconstitutional unless they conflict with a choice made by a political party. Further, it is equally clear that the Tenth Circuit understood that each case had to be analyzed under the particular circumstances and evidence presented in the record. The issue in *Jones* (as well as the instant case) is one of choice, not one

of absolute rules as to what kind of primary can be conducted.

The Tenth Circuit further noted that between the cases of *Tashjian*, *Jones*, and the instant case runs a "connecting thread" because in " . . . each of the three cases, the regulation at issue restricted the options of parties seeking to define the scope of their associational rights." *Beaver v. Clingman*, 363 F.3d at 1057. Further, the Tenth Circuit in citing to the *Jones* case noted that while a state has " . . . a compelling interest in political stability as a general matter, . . . our task is to examine whether '*in the circumstances of this case*,' [that interest is] compelling." *Beaver*, 363 F.3d at 1059, citing *Jones*, 530 U.S. at 584. Unlike Petitioners herein, the Tenth Circuit below recognized the complexity of the analysis required in *Jones* necessitated a look at the facts and circumstances in the record of the case at bar. Thus, the Tenth Circuit stated that " . . . Oklahoma's interest on this record and in the circumstances of this case is not a compelling one." *Beaver*, 363 F.3d at 1060.

III. The Tenth Circuit Court of Appeals Did Not Err in Deciding this Case.

The Tenth Circuit properly followed this Court's decisions in *California Democratic Party v. Jones* and *Tashjian v. Republican Party of Connecticut*. Petitioners, not the Tenth Circuit, have misinterpreted *California Democratic Party v. Jones* and *Tashjian*. Further, the particular facts in the record as developed in the Trial Court below did not support the alleged interest of the State in opposing a party-option open primary.

Finally, the Tenth Circuit correctly found that when a state attempts to regulate and control the boundaries which a political party wishes to exercise for its own primary election, the burden on associational rights is severe. In citing a number of decisions of this Court, the Tenth Circuit noted below that when states attempt to restrict political parties from defining the bounds of their own association, this Court closely scrutinizes the State's attempted regulation of the political party's rights to political association. *Beaver*, 363 F.3d at 1056; *Jones*, 530 U.S. 567, 582; *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 225 (1989); *Tashjian*, 479 U.S. at 225; *Democratic Party of the United States v. Wisconsin, ex rel. LaFollette*, 450 U.S. 107, 124 (1981), and *Cousins v. Wigoda*, 419 U.S. 477, 489 (1975). While the Tenth Circuit did recognize that in *Timmons v. Twin Cities Area New Party*, this Court had employed an intermediate scrutiny when analyzing Minnesota's prohibition of fusion candidacies, the issue in *Timmons* involved a right to candidacy issue and would still have allowed voters to vote for the candidate of their choice as opposed to the instant case. While *Timmons* involved a request to consider fusion candidacies and a candidate's choice of which party to associate with as a candidate, the instant case involves the issue of choice for individual voters. *Timmons* and the case at bar would only be analogous if Respondents herein had requested the right of fusion voting, i.e., voting in a voter's registered political party (e.g., Republican or Democratic) and at the same primary voting in the primary of the LPO.

CONCLUSION

The decision below does not conflict with a decision of this Court or any Court of Appeals. Two Courts of Appeals have now considered the precise question presented here, and, based on the records presented to the First Circuit in *Cool Moose* and the Tenth Circuit in *Beaver*, both Circuit Courts have reached the identical conclusion: a political party may at its option open its political primary to voters from other political parties if the record does not establish a compelling interest on the part of the state.

Because Petitioners offer no compelling reason for this Court to exercise its discretionary power to grant a Writ of Certiorari, as required by Supreme Court Rule 10, because there is no conflict between Circuit Courts of Appeals and their decisions, and because the Court of Appeals correctly applied existing law to the case, Petitioners' request for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 04-37

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In The Supreme Court of the United States

MICHAEL CLINGMAN, GLO HENLEY, KENNETH MONROE, THOMAS PRINCE AND THE OKLAHOMA STATE ELECTION BOARD,

Petitioners,

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Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

JOINT APPENDIX

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Other documents:

The Opinion of the Tenth Circuit Court of Appeals is not reproduced in the Joint Appendix but was reproduced in the Petition for Writ of Certiorari at Appendix 1

The Memorandum Opinion of the United States District Court for the Western District of Oklahoma is not reproduced in the Joint Appendix but was reproduced in the Petition for Writ of Certiorari at Appendix 24

RELEVANT DOCKET ENTRIES

General Docket
United States Court of Appeals for the 10th Circuit

2/26/03 [1591109] Civil case docketed. Preliminary record filed. DATE RECEIVED: 02/26/03. Transcript order form due 3/10/03 for Tracy Washbourne pursuant to R.42.1. Docketing statement due 3/10/03 for Libertarian Party, et al. Notice of appearance due 3/10/03 for Ok. St. Election Bd., et al. and Libertarian Party, et al.. (bjv)

2/28/03 [1591712] Transcript order form filed by Tracy Washbourne. Transcript due 4/25/03 for Tracy Washbourne. (bjv)

3/3/03 [1592356] Notice of appearance filed by James C. Linger as attorney for Andrea L. Beaver, Floyd Turner, Minelle L. Batson, Mary Y. Burnett, Michael L. Seymour, Terry L. Beaver, Robert T. Murphy, Sharon Lynn Atherton, Roger Bloxham, Steve Galpin, Richard P. Prawdzienski, Michael Clem, Whitney L. Boutin, Christopher S. Powell, Charles A. Burris and Libertarian Party. CERT. OF INTERESTED PARTIES (y/n): y. (lg)

3/3/03 [1592357] Docketing statement filed by Andrea L. Beaver, Floyd Turner, Minelle L. Batson, Mary Y. Burnett, Michael L. Seymour, Terry L. Beaver, Robert T. Murphy, Sharon Lynn Atherton, Roger Bloxham, Steve Galpin, Richard P. Prawdzienski, Michael Clem, Whitney L. Boutin, Christopher S. Powell, Charles A. Burris and Libertarian Party. Original and 4 copies, c/s: y. (lg)

3/12/03 [1595057] Notice of appearance filed by Wellon B. Poe as attorney for Michael Clingman, Glo Henley, Kenneth Monroe, Thomas E. Prince, Ok. St. Election Bd.. CERT. OF INTERESTED PARTIES (y/n): n (jet)

* * *

6/16/03 [1620684] Appellants' brief filed by Andrea L. Beaver, Floyd Turner, Minelle L. Batson, Mary Y. Burnett, Michael L. Seymour, Terry L. Beaver, Robert T. Murphy, Sharon Lynn Atherton, Roger Bloxham, Steve Galpin, Richard P. Prawdzienski, Michael Clem, Whitney L. Boutin, Christopher S. Powell, Charles A. Burris and Libertarian Party. Original and 7 copies. c/s: y. Served on 6/13/03. Oral argument? y. Appendix filed. Original and 1 appendix copy. Appendix Pages: 316. Appellees' brief due 7/16/03 for Ok. St. Election Bd., Thomas E. Prince, Kenneth Monroe, Glo Henley, and Michael Clingman. (afw)

7/18/03 [1628745] Appellee's brief filed by Michael Clingman, Glo Henley, Kenneth Monroe, Thomas E. Prince, and Ok. St. Election Bd. Original and 7 copies. c/s: y. Served on 7/16/03. Oral Argument? n. Appellant's optional reply brief due 8/4/03 for Libertarian Party, Charles A. Burris, Christopher S. Powell, Whitney L. Boutin, Michael Clem, Richard P. Prawdzienski, Steve Galpin, Roger Bloxham, Sharon Lynn Atherton, Robert T. Murphy, Terry L. Beaver, Michael L. Seymour, Mary Y. Burnett, Minelle L. Batson, Floyd Turner, and Andrea L. Beaver. (kr)

8/4/03 [1632737] Appellant's reply brief filed by Andrea L. Beaver, et al. Original and 7 copies. c/s: y (lg)

* * *

1/14/04 [1678166] Case argued by James C. Linger, for appellant and Wellon B. Poe, Jr., for appellee; Submitted to Judges Kelly, Lucero, O'Brien. (ss)

4/6/04 [1698773] Terminated on the Merits after Oral Hearing; Reversed; Remanded. Written, Signed, Published. Kelly; Lucero, authoring judge;

O'Brien. [03-6058] Parties served by mail on 4/6/04. (oac)

* * *

4/28/04 [1704271] Mandate issued to district court. Mandate receipt due 5/28/04. (afw)

* * *

U.S. District Court – Western District of Oklahoma
Civil Docket For Case # : 5:00-cv-01071

Date Filed	#	Docket Text
06/16/2000	1	COMPLAINT (eh) (Entered: 06/19/2000
		* * *
06/27/2000	8	MOTION by plaintiffs for preliminary injunction (ap) (Entered: 06/28/2000)
06/27/2000	9	BRIEF FILED by plaintiffs in support of motion for preliminary injunction [8-1] (ap) (Entered: 06/28/2000)
		* * *
07/17/2000	14	RESPONSE IN OPPOSITION by defendant Lance Ward, defendant Kenneth Monroe, defendant Thomas E Prince, defendant State Election Board, defendant Glo Henley to motion for preliminary injunction [8-1] (cjs) (Entered: 07/18/2000)
07/17/2000	15	JOINT STIPULATED FACTS/NOTICE by plaintiff Andrea L Beaver, plaintiff Floyd Turner, plaintiff Minelle L Batson, plaintiff Mary Y Burnett, plaintiff Michael L Seymour, plaintiff Terry L Beaver, plaintiff Robert T Murphy, plaintiff Sharon Lynn Atherton, plaintiff Roger Bloxham, plaintiff Steve Galpin, plaintiff Richard P Prawdzienski, plaintiff Michael A Clem, plaintiff Whitney L Boutin Jr, plaintiff Christopher S Powell, plaintiff Charles A Burris, plaintiff Libertarian Party OK, defendant Lance Ward, defendant Kenneth Monroe, defendant Thomas E Prince, defendant

		State Election Board, defendant Glo Henley (cjs) (Entered: 07/18/2000)
07/17/2000	16	ANSWER by defendant Lance Ward, defendant Kenneth Monroe, defendant Thomas E Prince, defendant State Election Board, defendant Glo Henley (cjs) (Entered: 07/18/2000)
		* * *
07/20/2000	17	SUPPLEMENTAL by all parties Joint Stipulation of Fact (fp) (Entered: 07/20/2000)
		* * *
07/24/2000	19	ORDER by Honorable Tim Leonard denying plf's motion for preliminary injunction [8-1] (cc: all counsel) [EOD Date 7/24/00] (ap) (Entered: 07/24/2000)
		* * *
09/14/2000	23	AMENDED COMPLAINT [1-1] by plaintiffs Andrea L Beaver, Floyd Turner, Minelle L Batson, Mary Y Burnett, Michael L Seymour, Terry L Beaver, Robert T Murphy, Sharon Lynn Atherton, Roger Bloxham, Steve Galpin, Richard P Prawdzienski, Michael A Clem, Whitney L Boutin Jr, Christopher S Powell, Charles A Burris, Libertarian Party OK (ap) (Entered: 09/14/2000)
09/19/2000	24	ANSWER by defendant Lance Ward, defendant Kenneth Monroe, defendant Thomas E Prince, defendant State Election Board, defendant Glo Henley (cjs) (Entered: 09/20/2000)

* * *

07/16/2001 35 MOTION by defendant Lance Ward, defendant Kenneth Monroe, defendant Thomas E Prince, defendant State Election board, defendant Glo Henley for summary judgment and brf in supp (ap) (Entered: 07/17/2001)

* * *

08/16/2001 38 RESPONSE by plaintiffs to dfts' motion for summary judgment [35-1] (ap) (Entered: 08/16/2001)

08/16/2001 39 SUGGESTION on Record for Substitution of Pty Dft by plaintiff Andrea L Beaver (ap) (Entered: 08/17/2001)

08/20/2001 40 ORDER by Honorable Tim Leonard Michael Clingman, Sec of Okla St Election Bd is substituted as pty dft in place of Lance Ward, Sec of Okla St Election Bd re [39-1] (cc: all counsel) [EOD Date 8/20/01] (ap) (Entered: 08/20/2001)

* * *

10/09/2001 45 SUPPLEMENT by plaintiffs re motion response [38-1] to dft's Mtn Summ Jgm (ap) (Entered: 10/10/2001)

* * *

12/05/2001 49 PROPOSED Findings of fact and conclusions of law by plaintiffs (ap) (Entered: 12/07/2001)

12/05/2001 50 TRIAL brief submitted by plaintiffs (ap) (Entered: 12/07/2001)

12/05/2001 51 PROPOSED Findings of fact and conclusions of law by defendants (ap) (Entered: 12/07/2001)

12/05/2001 52 TRIAL brief submitted by defendants (ap) (Entered: 12/07/2001)

* * *

12/11/2001 54 ORDER by Honorable Stephen P. Friot denying dfts' motion for summary judgment [35-1] (cc: all counsel) [EOD Date 12/11/01] (ap) (Entered: 12/11/2001

* * *

11/25/2002 63 AMENDED AND SUPPLEMENTAL Trial Brief of defendants re [52-1] (ap) (Entered: 11/26/2002)

11/25/2002 64 AMENDED JOINT PRE-TRIAL REPORT (ap) (Entered: 11/26/2002)

11/25/2002 65 AMENDED TRIAL brief submitted by plaintiffs (ap) (Entred: 11/26/2002)

11/25/2002 66 AMENDED PROPOSED Findings of fact and conclusions of law by plaintiffs (ap) (Entered: 11/26/2002)

12/02/2002 67 NON-JUR TRIAL COURTROOM MINUTES: Trial began before the Honorable Stephen P. Friot; plf's cnsl Jim Linger; dft's cnsl Wellon B Poe; ptys announce ready; plf – dft make opening statement; plf presents case in chief with testimony of witnesses; plf rests; non-jury trial began 12/2/02 (ap) (Entered: 12/04/2002)

12/03/2002 68 FURTHER NON-JURY TRIAL COURTROOM MINUTES: Before the honorable

Stephen P. Friot; plf's cnsl Jim Linger; dft's cnsl Wellon Poe; dft presents case in chief with testimony of witnesses; dft rests; Case taken under advisement; non-jury trial ends 12/3/02 (ap) (Entered: 12/04/2002)

12/04/2002 69 ORDER by Honorable Stephen P. Friot the proposed Amended Final Pre-Trial Report re [64-1] is approved (cc: all counsel) [EOD Date 12/4/02] (ap) (Entered: 12/04/2002)

01/24/2003 70 MEMORANDUM OPINION: by Honorable Stephen P. Friot (cc: all counsel) (cjs) (Entered: 01/24/2003)

01/24/2003 71 JUDGMENT: by Honorable Stephen P. Friot re [70-1], dismissing case (cc: all counsel) (cjs) (Entered: 01/24/2003)

02/21/2003 72 NOTICE OF APPEAL by plaintiff Andrea L Beaver, plaintiff Floyd Turner, plaintiff Minelle L Batson, plaintiff Mary Y Burnett, plaintiff Michael L Seymour, plaintiff Terry L Beaver, plaintiff Robert T Murphy, plaintiff Sharon Lynn Atherton, plaintiff Roger Bloxham, plaintiff Steve Galpin, plaintiff Richard P Prawdzienski, plaintiff Michael A Clem, plaintiff Whitney L Boutin Jr, plaintiff Christopher S Powell, plaintiff Charles A Burris from Dist. Court decision transcript order set for 3/6/03 [71-1], [70-1] (dl) (Entered: 02/24/2003)

* * *

04/28/2003 TRANSCRIPT of Non-Jury Trial held on December 2, 2002, Vol. I of II by

CSR Tracy Washbourne (dl) (Entered: 04/29/2003)

04/28/2003 TRANSCRIPT of Non-Jury Trial held on December 3, 2002 Vol. II of II by CSR Tracy Washbourne (dl) (Entered: 04/29/2003)

* * *

05/04/2004 85 MANDATE From USCA – The judgment is Reversed. The case is Remanded to the District Court [72] Notice of Appeal,, filed by Sharon Lynn Atherton, Robert T Murphy, Roger Bloxham, Michael A Clem, Charles A Burris, Andrea L Beaver, Floyd Turner, Minelle L Batson, Mary Y Burnett, Michael L Seymour, Terry L Beaver, Steve Galpin, Richard P Prawdzienski, Whitney L Boutin, Christopher S Powell (Attachments: #1 Attachment Continued) (dl,) (Entered: 05/04/2004)

* * *

05/20/2004 92 MANDATE from USCA – Statement of cost [72] Notice of Appeal,, filed by Sharon Lynn Atherton, Robert T Murphy, Roger Bloxham, Michael A Clem, Charles A Burris, Andrea L Beaver, Floyd Turner, Minelle L Batson, Mary Y Burnett, Michael L Seymour, Terry L Beaver, Steve Galpin, Richard P Prawdzienski, Whitney L Boutin, Christopher S Powell (dl,) (Entered: 05/25/2004)

* * *

06/29/2004 97 JUDGMENT in favor of Plaintiffs against Defendants, consistent with the opinion and judgment of the US Court of Appeals for the 10th Circuit on 4/6/04. Judgment grants 95 Motion to Enter Judgment and Permanent Injunction filed by Plaintiffs. Okla. Stat. Ct. 26, secs. 1-104(A) and 1-104(B)(4) are declared, as applied to the plaintiffs herein, unconstitutional to the extent that they prevent a recognized political party in the State of Oklahoma from permitting voters registered as members of other political parties from voting in the political party's primary election or runoff primary election pursuant to the political party's choice. Defendants are enjoined from enforcing, applying, or implementing Okla. Stat. tit. 26, sec. 1-104(B)(4) to the extent that said election statute would prevent the plaintiffs or any other political party from inviting any registered voter of another political party from voting in the political party's primary election or runoff primary election pursuant to the choice of the political party in question. Effective immediately, the Oklahoma State Election Board must allow any recognized political party or a group of persons seeking to form a recognized political party to notify the Secretary of the Oklahoma State Election Board, pursuant to Okla. Stat. tit. 26, sec. 1-104, as to whether or not the party intends to permit registered voters designated as Independents or members of other political parties to vote in a primary

election or runoff primary election of the party. If the party is recognized and the group of persons seeking recognition of the party notifies the Secretary of the State Election Board of such intention, registered of the party notifies the Secretary of the State Election Board of such intention, registered voters designated as Independents or members of other political parties shall be permitted to vote in any primary election or runoff primary election of the party held prior to January 1 of the following even-numbered year. Defendants' request for a stay of the enforcement or effect of this judgment or of any injunctive-type relief is DENIED. Signed by Judge Stephen P. Friot on 6/29/04. (llg) (Entered: 06/29/2004)

* * *

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

(1) ANDREA L. BEAVER; (2) FLOYD TURNER; (3) MINELLE L. BATSON; (4) MARY Y. BURNETT; (5) MICHAEL L. SEYMOUR; (6) TERRY L. BEAVER; (7) ROBERT T. MURPHY; (8) SHARON LYNN ATHERTON; (9) ROGER BLOXHAM; (10) STEVE GALPIN; (11) RICHARD PRAWDZIENSKI; (12) MICHAEL A. CLEM; (13) WHITNEY I. BOUTIN, JR.; (14) CHRISTOPHER S. POWELL; (15) CHARLES A. BURRIS; AND THE (16) LIBERTARIAN PARTY OF OKLAHOMA a/k/a Libertarian Political Organization; Plaintiffs, v. (1) LANCE WARD, Secretary of the Oklahoma State Election Board; (2) GLO HENLEY, Chairman of the Oklahoma State Election Board; (3) KENNETH MONROE, Vice Chairman of the Oklahoma State Election Board; (4) THOMAS E. PRINCE, Member of the Oklahoma State Election Board; and the (5) OKLAHOMA STATE ELECTION BOARD; Defendants.	Case No. CIV-00-1071-L

AMENDED COMPLAINT

(Filed Sep. 14, 2000)

COME now the Plaintiffs after obtaining leave of Court to file an Amended Complaint pursuant to paragraph 20 of

the Scheduling Order of September 5, 2000, and for their cause of action against the Defendants, hereby amend their complaint to allege and state as follows, to-wit:

I.

Plaintiff ANDREA L. BEAVER is a resident of Tulsa County and a registered Democratic voter in Tulsa County, Oklahoma. Plaintiff FLOYD TURNER is a resident of Tulsa County and a registered Democratic voter in Tulsa County, Oklahoma. Plaintiff MINELLE L. BATSON is a resident of Oklahoma County and a registered Democratic voter in Oklahoma County, Oklahoma. Plaintiff MARY Y. BURNETT is a resident of Rogers County, and a registered Republican voter in Rogers County, Oklahoma. Plaintiff MICHAEL L. SEYMOUR is a resident of Tulsa County and a registered Republican voter in Tulsa County, Oklahoma. Plaintiff TERRY L. BEAVER is a resident of Tulsa County and a registered Republican voter in Tulsa County, Oklahoma.

Plaintiff ROBERT T. MURPHY is a resident of Cleveland County, a registered Libertarian voter in Cleveland County, Oklahoma, is a candidate for the Libertarian nominations for United States Reprentative [sic] for the 5th District of Oklahoma, and is the Chair of the Oklahoma Libertarian Party. Plaintiff SHARON LYNN ATHERTON is a resident of Tulsa County and a registered Libertarian voter in Tulsa County, Oklahoma. Plaintiff ROGER BLOXHAM is a resident of Tulsa County, a registered Libertarian voter in Tulsa County, Oklahoma, was a candidate for the Libertarian nomination for Corporation Commissioner in Oklahoma at the Primary Election conducted on August 22, 2000, and is the Libertarian nominee for Corporation Commissioner in the

State of Oklahoma for the General Election to be conducted on November 7, 2000. Plaintiff STEVE GALPIN is a resident of Oklahoma County, a registered Libertarian voter in Oklahoma County, Oklahoma, and is the Libertarian Voter Registration and Ballot Access Coordinator for the State of Oklahoma. Plaintiff RICHARD P. PRAWDZIENSKI is a resident of Oklahoma County, a registered Libertarian voter in Oklahoma County, Oklahoma, and was a candidate for the Libertarian nomination for Corporation Commissioner in Oklahoma at the Primary Election conducted on August 22, 2000. Plaintiff MICHAEL A. CLEM is a resident of Tulsa County, a registered Libertarian voter in Tulsa County, Oklahoma, and is a candidate for the Libertarian nomination for United States Representative from the 1st District of Oklahoma. Plaintiff WHITNEY I. BOUTIN, Jr., is a resident of Cleveland County, a registered Libertarian voter in Cleveland County, Oklahoma, was the leading candidate for the Libertarian nomination for Corporation Commissioner in Oklahoma at the Primary Election conducted on August 22, 2000, but withdrew from said candidacy in order to avoid a Run-off Election because all Oklahoma voters would not [sic] permitted to vote in said Run-off Election and to save taxpayers money which would otherwise be expended on a Run-off Election which would not be conducted in the manner that the Libertarian Party of Oklahoma wished it to be conducted. Plaintiff CHRISTOPHER S. POWELL is a resident of Oklahoma County, a registered Libertarian voter in Oklahoma County, Oklahoma, and is a candidate for the Libertarian nomination for the State House of Representatives in District 100. Plaintiff CHARLES A. BURRIS is a resident of Tulsa County and a registered Libertarian voter in Tulsa County, Oklahoma.

Plaintiff LIBERTARIAN PARTY OF OKLAHOMA, a/k/a Libertarian Political Organization, is currently recognized in the State of Oklahoma as a political party pursuant to OKLA. STAT. tit. 26, § 1-108, but was recognized at the time of the filing of the original Complaint in this action on June 16, 2000, as a political organization pursuant to OKLA. STAT. tit. 26, § 1-109(B), and became recognized as a political party pursuant to OKLA. STAT. tit. 26, § 1-108, on or about June 20, 2000, after the Libertarian Party turned in approximately 99,000 signatures pursuant to OKLA. STAT. tit. 26, § 1-108 on May 31, 2000. Plaintiff Libertarian Party of Oklahoma intends to continue to attain recognition as a political party pursuant to OKLA. STAT. tit. 26, § 1-108 during future Presidential election years in the event the Libertarian Party of Oklahoma reverts back to the status of the Libertarian political organization pursuant to OKLA. STAT. tit. 26, § 1-109(B) after the General Election in Oklahoma on November 7, 2000.

All the above-named individual Plaintiffs are citizens of the State of Oklahoma and the United States of America, registered voters of the State of Oklahoma, and wished to have the right to cast their votes in the Libertarian Primary Election which was held in Oklahoma on August 22, 2000, and in any future Libertarian Primary or Run-off Elections conducted in the State of Oklahoma.

II.

Defendant LANCE WARD is the Secretary of the Oklahoma State Election Board (hereinafter referred to as Defendant Secretary and Defendant Board, respectively, and is responsible for administering the election and voter registration laws of the State of Oklahoma pursuant to

OKLA. STAT. tit. 26, § 2-107. Specifically, the Defendant SECRETARY has supervisory authority over all county election boards, has responsibility to promulgate, repeal or modify such rules or regulations as he deems necessary to facilitate and assist in achieving and maintaining uniformity in the application, operation, and interpretation of the State and Federal election laws and a maximum degree of correctness, impartiality, and efficiency in administration of the election laws, and to act as the chief state election official responsible for coordination of state responsibilities under the National Voter Registration Act of 1993 (42 U.S.C. § 1973gg, *et seq.*).

Defendant GLO HENLEY is the Chairman of the Defendant Board, Defendant KENNETH MONROE is the Vice Chairman of the Defendant Board, and THOMAS E. PRINCE is a member of the Defendant Board.

Defendant BOARD is a state agency and body politic organized under the laws of the State of Oklahoma, viz.: OKLA. STAT. tit. 26, § 2-101, *et seq.*, to operate and perform such duties as are prescribed by law for the purposes of overseeing elections conducted in the State of Oklahoma.

All the aforesaid Defendants have offices in Room B-6, State Capitol Building, Oklahoma City, Oklahoma, 73152.

III.

This is an action for declaratory and injunctive relief. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1343(3), 1343(4), 2201, and 2202, and 42 U.S.C. § 1983. Venue of this Court is invoked pursuant to 28 U.S.C. § 1391. The rights, privileges, and immunities

sought to be declared and redressed are those secured by the First and Fourteenth Amendments to the United States Constitution.

IV.

This proceeding seeks a judgment declaring OKLA. STAT. tit. 26, §§ 1-104(A) and 1-104(B)(4), as applied to the Plaintiffs, unconstitutional in that they violate the First and Fourteenth Amendments of the United States Constitution and 42 U.S.C. § 1983. This proceeding also seeks an injunction, both temporary and permanent, against Defendants SECRETARY and BOARD, and their members above-styled, prohibiting said Defendants from following and enforcing the provisions of OKLA. STAT. tit. 26, §§ 1-104(A) and 1-104(B)(4), as applied to the Plaintiffs herein, to the extent that said statutes would be interpreted as preventing a recognized political party in Oklahoma from opening up its Primary and Run-off Elections to all Oklahoma registered voters regardless of political party affiliation.

V.

The laws in question which were stated in rhetorical paragraph IV above are as follows, to-wit:

OKLA. STAT. tit. 26, § 1-104, Closed primaries – Independent voters

> A. No registered voter shall be permitted to vote in any Primary Election or Runoff election of any political party except the political party of which his registration form shows him to be a member, except as otherwise provided by this section.

* * *

B. 4. A group of persons seeking to form a recognized political party pursuant to the provisions of Section 1-108 of this title shall, upon filing of the petitions seeking recognition of the political party with the Secretary of the State Election Board, notify the Secretary of the State Election Board as to whether or not the party intends to permit registered voters designated as Independents to vote in a Primary Election or Runoff Primary Election of the party. If the party is recognized and the group of persons seeking recognition of the party notifies the Secretary of the State Election Board of such intention, registered voters designated as Independents shall be permitted to vote in any Primary election or Runoff Primary Election of the party held prior to January 1 of the following even-numbered year.

VI.

On the 31st day of May, 2000, the Libertarian Political Organization of Oklahoma turned in a designation to the Secretary of the Oklahoma State Election Board, pursuant to OKLA. STAT. tit. 26, § 1-104(B)(4), stating that Independent voters may vote in the Libertarian Party's Primary in Oklahoma in the year 2000. Further, the Libertarian Political Organization further stated that all other Oklahoma registered voters – whether they were Republican, Democrat, Reform, or any other recognized political party or political organization – may also vote in the Oklahoma Libertarian Primary in the year 2000. The Secretary of the Oklahoma State Election Board accepted said notification as to Independent voters only.

The Libertarian Party of Oklahoma feels that it would be advantageous to it as a political party and important to its members and all voters of Oklahoma if their rights to political association and political speech pursuant to the First and Fourteenth Amendments to the United States Constitution were furthered by opening up the Libertarian Party Primary and Run-off Elections to all Oklahoma voters regardless of political affiliation.

The Libertarian Party of Oklahoma and its members feel that opening up of the Libertarian Party of Oklahoma's Primary and Run-off Elections would help them reach out to Libertarian-oriented voters of other political affiliations, produce a more viable Libertarian candidate for the General Election, create favorable publicity for the Libertarian Party, and encourage further expansion and growth of the Libertarian philosophy. It has also been the experience of most Libertarians that many individuals not formally affiliated with the Libertarian Party share Libertarian views on certain issues so as to support the advancement of common political objectives favored by the Libertarians. Also, the Libertarians have found and believe that there are a number of voters in the State of Oklahoma who are registered in political parties other than the Libertarian Party who wish to vote in the Libertarian Party's Primary and Run-off Elections in the State of Oklahoma in the year 2000, and in future Primary and Run-off Elections to be conducted in the State of Oklahoma on behalf of the Libertarian Party.

That the Libertarian Party of Oklahoma has passed By-laws and resolutions which permit all registered Oklahoma voters – whether they be Republican, Democratic, Reform, Independent, Libertarian, or any other designation – to vote in any Primary or Run-off Election

conducted by the Libertarian Party in any election in the year 2000 or in any future Primary or Run-off Election conducted in the State of Oklahoma for the Libertarian Party.

VII.

In the election year in Oklahoma for the year 2000, the filing period for political party nominations is on July 10, 11, and 12, 2000, while the political party Primary election is held on August 22, 2000, a Runoff Election on September 19, 2000, and the General Election on November 7, 2000. In the election year in Oklahoma for the year 2004, the filing period for political party nominations is on July 12, 13, and 14, 2004, while the political party Primary Election is held on August 24, 2004, a Run-off Election on September 21, 2004, and the General Election on November 2, 2004. If OKLA. STAT. tit. 26, §§ 1-104(A) and 1-104(B)(4) are enforced so as to deny the Libertarian Party of Oklahoma and individual Oklahoma registered voters who are not either Libertarians or Independents the right to vote in the Libertarian Party Primary and Run-off Election in the year 2000 and/or in future Libertarian Party Primary or Run-off Elections in the State of Oklahoma, then the rights to political association and First Amendment free speech of the Libertarian Party of Oklahoma, the individual members of the Libertarian Party of Oklahoma, the Libertarian Party candidates, and those Oklahoma voters who are not either registered as Libertarians or Independents, but who wish to vote in the Oklahoma Libertarian Primary Election or Run-off Election in the year 2000, or in future Oklahoma Primary or Run-off Elections for the Libertarian Party, will be abridged and denied.

VIII.

Defendant SECRETARY, BOARD, and the individual members of Defendant BOARD named herein as Defendants, have and will exercise their authority under color of state law in enforcing the aforesaid state laws in such a manner as to be in an unlawful, discriminatory, capricious, and arbitrary manner, in violation of the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983, in that:

A. By reason of said required action as set forth in rhetorical paragraph VII above by said Defendants, through its named Defendant members and their agents, employees, and servants, the Plaintiffs herein will be denied their rights to actively engage in the exercise of their free speech, right to political association, seek redress of grievances, cast an effective vote, and equal protection and due process of the laws of the United States of America;

B. Said required action as set forth in rhetorical paragraph VII above works to further no constitutional compelling state interest or political purpose for said state election laws, Plaintiffs' fundamental constitutional freedoms are or will be denied and abridged, and the laws in question work in an unequal and discriminatory manner in that they favor the established and entrenched political parties (viz.: Republican Party and Democratic Party).

IX.

Plaintiffs herein will suffer immediate and irreparable harm in the event that the complained of actions set forth in rhetorical paragraph VII and VIII hereinabove are allowed to occur. The effect of the aforesaid complained of actions would be to effectively deny Plaintiffs those rights

enumerated hereinabove in rhetorical paragraph VIII(A). Plaintiffs have no adequate remedy at law for the denial of their rights and the impairment of the constitutional rights, privileges, and immunities enjoyed by a citizen of the United States and the State of Oklahoma, and, unless a temporary injunction and a permanent injunction are granted, Plaintiffs will suffer great and irreparable harm.

WHEREFORE, Plaintiffs demand judgment: -

1. Declaring that the said required actions as set forth in rhetorical paragraph VII above pursuant to OKLA. STAT. tit. 26, §§ 1-104(A) and 1-104(B)(4) are illegal and unconstitutional, particularly as applied to the facts of the case at bar in that they are in violation of the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983;

2. Entering a preliminary and permanent injunction restraining, prohibiting, and enjoining the Defendants to the instant action, their agents, employees, and servants, and all persons in active concert and participation with them, from enforcing, applying, or implementing the aforesaid complained of state election laws as applied to the instant Plaintiffs and all similarly situated individuals who support and wish to vote in Oklahoma in the Libertarian Primary and – if necessary – Run-off Elections in the year 2000 and future Libertarian Primary and Run-off Elections in the State of Oklahoma;

3. Awarding Plaintiffs reasonable costs and expenses in this action including attorney fees pursuant to the Civil Rights Attorney Fees Awards Act of 1976, 42 U.S.C. § 1988; and

4. Granting Plaintiffs such further relief as to which they may be entitled and which the Court may deem just and equitable.

Dated this 13th day of September, 2000.

ANDREA L. BEAVER; FLOYD TURNER; MINELLE L. BATSON, MARY Y. BURNETT; MICHAEL L. SEYMOUR; TERRY L. BEAVER, ROBERT T. MURPHY; SHARON LYNN ATHERTON; ROGER BLOXHAM; STEVE GALPIN; RICHARD P. PRAWDZIENSKI; MICHAEL A. CLEM; WHITNEY L. BOUTIN, JR.; CHRISTOPHER S. POWELL; CHARLES A. BURRIS; LIBERTARIAN PARTY OF OKLHOMA [sic], Plaintiffs

JAMES C. LINGER, OBA#5441
Counsel for Plaintiffs

/s/ James C. Linger
1710 South Boston Avenue
Tulsa, Oklahoma 74119-4810
(918) 585-2797 (918) 583-8283 Facsimile

CERTIFICATE OF MAILING

I hereby certify that on this 13th day of September, 2000, a true and correct copy of the above and foregoing instrument was mailed to Defendants' counsel, WELLON B. POE, JR., ESQ., Assistant Attorney General, 4545 North Lincoln Boulevard, Suite 260, Oklahoma City, Oklahoma 73105.

/s/ James C. Linger
JAMES C. LINGER

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

ANDREA L. BEAVER, et al.,

Plaintiffs,

v. Case No. CIV-00-1071-L

LANCE WARD, Secretary of the
Oklahoma State Election Board, et al.,

Defendants.

ANSWER TO FIRST AMENDED COMPLAINT

(Filed Sep. 19, 2000)

COME NOW the Defendants, by and through Wellon B. Poe, Assistant Attorney General and, in Answer to Plaintiffs' First Amended Complaint, state as follows:

1. These Defendants admit that the Libertarian Party of Oklahoma is currently recognized as a political party pursuant to Oklahoma Statutes. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Section I and therefore deny the same.

2. These Defendants admit the allegations contained in Section II.

3. These Defendants admit this Firs' Amended Complaint is an action for declaratory and injunctive relief as stated in Section III. These Defendants deny that any rights, privileges or immunities of any of the Plaintiffs have been violated by actions of the Defendants.

4. These Defendants admit that the First Amended Complaint seeks a judgment declaring 26 O.S. § 1-104(A)

and § 1-104(B)(4) unconstitutional. These Defendants deny that those statutory provisions are unconstitutional or that Plaintiffs are entitled to any declaratory or injunctive relief as sought in Section IV of the First Amended Complaint.

5. Section V of the First Amended Complaint requires no response from these Defendants.

6. These Defendants admit the allegations contained in the first paragraph of Section VI of the First Amended Complaint. These Defendants deny the remaining allegations of Section VI of the First Amended Complaint.

7. These Defendants admit the allegations contained in Section VII in regards to dates for filing and elections in the State of Oklahoma for 2000. These Defendants deny the remaining allegations contained in Section VII of the First Amended Complaint.

8. These Defendants deny the allegations contained in Section VIII and subsections A and B of the First Amended Complaint.

9. These Defendants deny the allegations contained [sic] Section IX of the First Amended Complaint.

10. These Defendants deny that Plaintiffs are entitled to any declaratory or injunctive relief or attorneys' fees, costs, or any other relief as requested in Plaintiffs' Demand, ¶¶ 1, 2, 3 and 4 of the First Amended Complaint.

11. These Defendants deny any assertion in the First Amended Complaint not specifically addressed elsewhere in this Answer.

AFFIRMATIVE DEFENSES

These Defendants assert the following affirmative defenses:

1. The First Amended Complaint fails to state a claim for any declaratory relief.

2. The First Amended Complaint fails to state a claim for any injunctive relief.

3. The Oklahoma Statutes in question are constitution as written and/or applied.

4. There has been and will be no violation of any of Plaintiffs' First Amendment rights.

5. There has been and will be no violation of any of Plaintiffs' Fourteenth Amendment rights.

6. Plaintiff Libertarian Party of Oklahoma aka Libertarian Political Organization does not have standing to bring this Complaint.

7. The individually named Plaintiffs do not have standing to bring this Complaint.

8. These Defendants specifically reserve the right to add additional defenses as they may become known during the course of this litigation.

WHEREFORE, for premises considered, Defendants pray that Plaintiffs take nothing by way of their First Amended Complaint, that their request for injunctive and declaratory relief be denied and that Defendants be warded reasonable attorneys' fees, costs and any other relief this Court deems just and appropriate.

Respectfully submitted,

ATTORNEY FOR DEFENDANTS

/s/ Wellon B. Poe
WELLON B. POE, OBA # 12440
ASSISTANT ATTORNEYS GENERAL

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Oklahoma City, OK 73105
(405) 521-4274 Fax (405) 528-1867

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ANDREA L. BEAVER; et al., ... Plaintiffs,	)	
v.	)	Case No. CIV-00-1071-L
LANCE WARD, Secretary of the Oklahoma State Election Board; et al., ... Defendants.	)	

ORDER

(Filed Aug. 20, 2001)

NOW, on this 20th day of August, 2001, this matter came on to be heard on Plaintiffs' Suggestion on Record for Substitution of Party Defendant, and the Court, after considering said Suggestion filed herein, is of the opinion that the following Order should issue.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that said Suggestion be, and the same is hereby granted, and Michael Clingman, Secretary of the Oklahoma State Election Board, is substituted as party Defendant in place of Lance Ward, Secretary of the Oklahoma State Election Board.

It is so ordered this 20th day of August, 2001.

/s/ Tim Leonard
TIM LEONARD
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

No. 5:00-cv-01071

[Caption Omitted In Printing]

AFFIDAVIT OF RICHARD WINGER

City and County of San Francisco	)	PLAINTIFFS' TRIAL EXHIBIT NO. 3
State of California	)	

I, Richard Winger, being of sound mind and body and legal age, do hereby swear and affirm the following, to be used in *Beaver v Clingman*, case number CIV-00-1071-L, in the Western District of Oklahoma. I make this Affidavit from first hand personal knowledge, except as indicated otherwise hereinbelow:

1) I am a resident of the State of California.

2) I graduated from the University of California at Berkeley in 1966 with a BA degree in political science. Since 1985 I have been the publisher of *Ballot Access News*, a non-partisan newsletter that reports on developments in ballot access law. I am on the editorial board of *Election Law Journal*, established 2001, edited by Daniel H. Lowenstein of the UCLA School of Law, and Rick Hasen, Loyola Law School, Los Angeles, and published by Mary Ann Liebert, Inc., of Larchmont, New York.

3) My articles about ballot access have been published as chapters in three books: (1) *Multiparty Politics in America*, edited by Paul S. Herrnson (1997: Rowman & Littlefield, Lanham, Md.); *The Encyclopedia of Third Parties in America*, edited by Immanuel Ness and James

Ciment (2000: M.E. Sharpe, Inc., Armonk, N.Y.); (3) *The New Populist Reader*, edited by Karl Trautman (1997): Praeger, Westport, Ct.).

4) Other articles of mine have been published in the *Wall Street Journal, Cleveland State Law Review, American Review of Politics, Oklahoma Politics, Chronicles* Magazine, *The Long Term View, Price Costco Connection,* and *California Journal.* I have appeared on national broadcasts of NBC, ABC, CNN National Public Radio, and Pacifica Radio, speaking on ballot access.

5) I have testified in ballot access lawsuits in person in Alaska, Arkansas, Florida, Oklahoma, Oregon, Pennsylvania, Texas and West Virginia and by affidavit in Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Iowa, Kansas, Kentucky, Maine, Maryland, Nevada, North Carolina, Oklahoma, Texas and Wyoming. I have been qualified as an expert witness in the areas of ballot access by federal courts in California, Arkansas, Oklahoma and West Virginia. The cases were *Citizens to Establish a Reform Party in Arkansas* v *Priest*, 970 F.Supp. 690 (E.D.Ar. 1996), *California Democratic Party* v *Jones*, 984 F.Supp. 1288 (E.D.Ca. 1997), *Fishbeck* v *Hechler*, 85 F.3d 162 (4th cir. 1996) and *Atherton* v *Ward*, 22 F.Supp. 2d 1265 (W.D. Ok. 1998).

Differences between Oklahoma and California Environments for Minor Parties

6) Minor parties in Oklahoma face a very different legal environment than minor parties in California. Consequently, they have different strategies and needs. It is rational that the Libertarian Party of Oklahoma seeks to

open its primary to all voters; and it is also rational that the Libertarian Party of California closes its primary to all but its own registrants. California election law nurtures minor parties. At the same time, California election law makes it very difficult for independent candidates to get on the ballot. Oklahoma law is the opposite. Oklahoma election law makes it virtually impossible for minor parties to thrive, but Oklahoma election law makes it very easy for independent candidates (for office other than president) to get on the November ballot. As a result, minor parties in California are relatively successful and have a fair amount of prestige, and are in danger of being infiltrated by opportunistic persons who merely want to use the party to enable themselves to win a place on the general election ballot. There is no such danger for minor parties in Oklahoma; such opportunistic persons use the lenient independent candidate petition procedures.

7) The following paragraphs deal with comparisons between Oklahoma and California for the period 1976 through the present. 1976 was chosen because the most important Oklahoma ballot access laws for minor parties went into effect in 1975, and they haven't substantially changed since. Also, the California ballot access laws have been unchanged since 1976. California and Oklahoma are similar, in requiring all qualified political parties to nominate by primary. California and Oklahoma are also similar, in providing that voters register as members of parties (or as independents) when they fill out a voter registration form.

The California Legal Environment for Minor Parties

8) California nurtures minor parties by making it easy for them to remain on the ballot, after they first qualify. A party remains qualified as long as it keeps its registration above one-fifteenth of 1% (California election law § 5101), and as long as it polls 2% of the vote for any statewide office in a mid-term gubernatorial year (§ 5101a). California elects 7 statewide state partisan constitutional officers in mid-term years. History shows that it is easy for a minor party to poll at least 2% of the vote for at least one of these offices. And even if a minor party should fail the 2% vote test, it is restored to the ballot if it can get its registration up to 1% of the last gubernatorial election in any registration tally after the election. In the years since 1975, there have been 52 instances at which a minor party appeared on the ballot in a California regularly-scheduled general election (2 minor parties in each of the election years 1976 through 1978, three minor parties in each election year 1980 through 1990, four minor parties in each election year 1992 through 1994, six minor parties in each election year 1996-1998, and five minor parties 2000-2002). Out of those 52 instances, there is only one instance at which a minor party ever lost its spot on the ballot (Peace & Freedom Party lost its place on the ballot in 1998). This means that when a minor party faces a California election, the odds are 98% that it will retain its place on the ballot.

9) The consequences of California's nurturing law, are that the minor parties are fairly strong and prestigious. Some of California's largest cities, and many of its medium-sized cities, have elected minor parties members to important public office. Currently both the Libertarian Party and the Green Party have registered members who

are County Supervisors (in Calaveras and San Francisco Counties). Each of these two minor parties has over 100 registered members who hold an elective city or other local office. The Green Party elected a state legislator in 1999, and the Libertarian Party polled 37% in a 1991 special legislative election. At the latest registration tally (February 2001), California's five qualified minor parties had 680,442 registered members, which was 4.4% of the total number of registered voters (that number doesn't include the members of unqualified minor parties, or the number of independents).

10) At the same time California give minor parties security and continuity, it makes it very difficult for independent candidates to get on the November ballot. Independent candidates for statewide office must collect signatures of 1% of the number of registered voters (approximately 150,000 signatures). Independent candidates for district office must collect signatures of 3% of the number of registered voters (more than 8,000 signatures in a typical US House district). These are difficult petition requirements; only 4 independent candidates for the US House have qualified in California since 1975.

11) The combination of California's making it easy for minor parties to thrive, but difficult for independent candidates to get on the ballot as independents, causes a danger for minor parties. California law creates a situation in which individuals who have no sympathy for the ideas of a particular minor party, but who desire to run for partisan office outside the major parties, are tempted to join minor parties for opportunistic reasons, just in hopes that they can win a minor party nomination, and in this way appear on the November ballot. This is often perceived as an easier task, than completing the onerous

independent candidate petition. Since California's minor parties are relatively large organizations, and frequently have contested primaries, California's minor parties do everything they can to guarantee that only candidates who represent the party's ideas can win the nomination. The parties have no power to prevent any person from registering as a member of that party. Furthermore, any person who has been a member of the party for a certain length of time can win a place on that party's primary ballot, by obtaining 40 signatures of party members and paying a filing fee (or, 65 signatures if the office is statewide). Thus, opportunistic outsiders can easily win a place on a minor party's primary. The only defense California minor parties have against such opportunistic outsiders, is for the parties to run loyal members for as many partisan offices as possible, and also to ensure that only loyal party members choose the nominees. For this reason, neither the Libertarian and Green Parties of California allow registered independents to vote in their primaries (under California law, parties are free to invite registered independents into their primaries, if they wish, and the two major parties do invite independents into their primaries).

The Oklahoma Legal Environment for Minor Parties

12) Oklahoma election law makes it virtually impossible for a minor party to thrive. Since 1975, a party must poll 10% for president in every presidential election year, and 10% for Governor in every gubernatorial mid-term year, in order to remain on the ballot. Minor parties cannot meet these requirements. No minor party has managed to poll as much as 10% of the vote for president, in the nation, for even two elections in a row, in U.S. history. And no minor party has ever polled as much as 10% of the vote for

Governor of Oklahoma, even once, since 1914. There are ten instances at which a minor party placed nominees on the Oklahoma ballot, under its party name, since 1975. Sometimes this was by a party qualifying as a political party; other times it was by an unqualified party, qualifying only its presidential candidate, under a special procedure governing presidential elections. Out of these ten instances, only once did the party poll 10% for the necessary office (the Reform Party in 1996). Oklahoma's 10% success rate for party survival contrasts markedly with the 98% California rate at which parties remain on the ballot. Furthermore, the Oklahoma petition to re-qualify a party, 5% of the last vote cast for president or governor (whichever is more recent) is so severe, such a petition has never been completed in Oklahoma in a mid-term year. For 2002, Oklahoma requires 61,712 signatures for this purpose. Yet no party in Oklahoma has ever managed to overcome a petition hurdle greater than 49,751 signatures (that was the requirement for getting a party on the ballot in 1996).

13) A consequence of Oklahoma's ballot access law is that minor parties in Oklahoma are extremely weak. Even though Libertarians have been elected to public office in a majority of states, no Libertarian, or member of any other minor party, has been elected to any Oklahoma public office since before 1975. In Oklahoma, no minor party since before 1975 has ever had more than two years and five months of continuous legal recognition. Because minor parties in Oklahoma do not enjoy stability of legal recognition, they have small memberships. For instance, in November 2000, there were only 703 registered Libertarians, and only 252 registered members of the Reform Party, in Oklahoma. By contrast, in Kansas, where the libertarian Party has enjoyed ten years of continuous

recognition and where the Reform Party has had five years of continuous recognition, in November 2000 there were 9,976 registered Libertarians and 1,888 Reform registrants, even though Kansas has a smaller population than Oklahoma.

14) Minor parties in Oklahoma, even when they do manage to be recognized, need not fear being invaded by opportunistic candidates (candidates who do not share the party ideology, but who join the party just so they can get on the ballot) because Oklahoma has extremely easy requirements for independent candidates (for office other than president) to get on the ballot. Such candidates need not submit any petition; they only pay the same filing fee that all candidates for the same office pay. Consequently, minor parties in Oklahoma do not worry about "strangers" running in their primaries. Therefore, since no one but *bona fide* party members ever choose to run in minor party primaries in Oklahoma, there is no disadvantage whatsoever, for minor parties to invite all registered voters to participate in their primaries. The Libertarian Party in Oklahoma, because it faces such a hostile legal environment, needs some means to attract voter interest. The party's idea of inviting all registered voters into its primary, is one such method. There is no logical contradiction between the Oklahoma Libertarian strategy, and the California Libertarian strategy, because the two parties face such different circumstances.

SIGNED /s/ Richard Winger

Signed this 5 day of October, 2001. Witnessed by _____, Notary Public. My Commission expires _____

CALIFORNIA ALL-PURPOSE ACKNOWLEDGEMENT

State of California
County of San Francisco } ss.

On 10-5-01, (Date) before me, Roberta J. Grover, (Name and Title of Officer (e.g., "Jane Doe, Notary Public")) personally appeared Richard Wagner, (Name(s) of Signer(s)).

☐ personally known to me
☒ proved to me on the basis of satisfactory evidence

to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

[SEAL]

ROBERTA J. GROVER
Commission #1306291
Notary Public – California
San Francisco County
My Comm. Expires
Jan. 25, 2005

Roberta J. Grover
Signature of Notary Public

Place Notary Seal Above

OPTIONAL

Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document

Description of Attached Document

Title or Type of Document: Affidavit Re Richard Wagner

Document Date: 10-5-01 Number of Pages: 6

Signer(s) Other Than Named Above: _____

Capacity(ies) Claimed by Signer

Signer's Name: _____

☒ Individual
☐ Corporate Officer – Title(s): _____
☐ Partner – ☐ Limited ☐ General
☐ Attorney in Fact
☐ Trustee
☐ Guardian or Conservator
☐ Other: _____

Signer is Representing: _____

RIGHT THUMBPRINT OF SIGNER
top of thumb here

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

No. 5:00-cv-01071

[Caption Omitted In Printing]

Ballot Access News

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March 14, 2002

Dear Jim,

In Rhode Island, the state does not tally the number of registered members in any particular party. However, this information is available from the Town Clerks. Rhode Island has 39 towns. I communicated with each Town Clerk to get these complete state registration totals:

Democratic	236,002
Republican	62,191
Cool Moose	1,010
Green	240
indp. and other	345,321
TOTAL	644,764

In Rhode Island, a registered independent may file to run in a partisan primary. But anyone who does so will have his or her registration automatically changed, to show membership in that party. In Alaska, no one may run in a partisan primary unless that person is a registered member of the party, on the day the person files to run in that primary.

A new book, *Voting at the Political Fault Line*, was published last month by the University of California Press. The subtitle is "California's Experiment with the Blanket Primary". The authors are all political scientists. The editors are Bruce E. Cain and Elisabeth R. Gerber. One of the chapters in the book, by Elisabeth Gerber, has definitions of "closed primary", "open primary", "blanket primary" and "semiclosed primary". They are:

Closed primary: "Under closed primaries, participation in the primary is limited to registered members of that party."

Blanket primary: "Participation is extended to all registered voters, including partisans, independents, and members of other parties."

Open primary: "Participation is open to all registered voters, but each party has a separate ballot, and voters are restricted to participating in a single party's nominations in a given election."

Semiclosed primary: "an intermediate form that allows independents and/or new voters to participate but not members of other parties."

These definitions are on page 193 and 211.

Sincerely yours,

/s/ Richard Winger

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

No. 5:00-cv-01071 PLAINTIFFS' TRIAL EXHIBIT

[Caption Omitted In Printing] NO. 4

SUPPLEMENTAL REPORT OF RICHARD WINGER

This supplemental report is to be used as an update of my affidavit in *Beaver v. Clingman*, case number CIV-00-1071-L in the Western District of Oklahoma.

Opinion one: the California election law concerning minor political parties is supportive of those parties (paragraph 8 of my affidavit). The basis for this opinion is the history of all six of the minor parties that have been qualified for the California ballot for the period of 1976-2002 (in particular, the history of their ability to remain on the ballot without the need to re-qualify). I have copies of a ballot from all California elections for this period, as well as official election returns from California, and copies of official registration data from California. Also I have been in close touch with leaders of all minor political parties in California for this entire period, and I have also been in close touch with officials of the Elections Division of the California Secretary of State's office. I am aware of the various election law issues that affected these California parties for this entire period.

Opinion two: California minor parties 1976-2002 have been relatively successful (paragraph 9 of my affidavit). The bases for this opinion include my election records, as described above; my collection of minor party publications; my own compiliation [sic] of minor party candidates and whether they were elected or not; and my acquaintence [sic] with other individuals in California minor parties who also keep records on minor party election victories.

Opinion three: California discourages independent candidates (paragraph 10 of my affidavit). The bases for this opinion are the election records described above, and my history of having been in close contact with the campaign organizations of all the independent candidates who ever seriously attempted to qualify in California, and the legal briefs and decisions of all ballot access lawsuits filed by statewide independent candidates between 1976 and 2002.

Opinion four: in California, the combination of tolerant ballot access laws for minor parties, combined with strict ballot access laws for independent candidates, creates an incentive for independent candidates to opportunistically join minor parties, just to hope to gain a spot on the general election ballot (paragraph 11 of my affidavit). The basis for this opinion is my awareness of minor party election activity in California. I have this awareness by having read the publications of all minor parties on the California ballot 1976-2002, and by having been in continuous communication with activists and leaders in each of these minor parties.

Opinion five: Oklahoma election law makes it virtually impossible for a minor party to enjoy stability in relation to being on the ballot (paragraph 12 of my affidavit). The basis for this opinion is my awareness of Oklahoma ballot access requirements, and how they have worked in practice. I have this awareness by knowing the history of the Oklahoma ballot access laws, by my collection of Oklahoma election returns, and by my continuous communication with the national leaders and activists of all the minor parties that have seriously tried to qualify for the Oklahoma ballot 1976-2002.

Opinion six: minor parties in Oklahoma are not successful (paragraph 13 of my affidavit). The bases for this opinion are my continuous reading of minor party publications, my research into petition requirements of all the states and when and by whom they have been used, my collection of Oklahoma election returns, and my continuous communication with leaders of minor parties who have been organized in Oklahoma.

Opinion seven: minor parties in Oklahoma, when they do manage to be recognized, need not fear being invaded by opportunistic candidates because Oklahoma has extremely easy requirements for independent candidates (for office other than president) to get on the ballot (paragraph 14 of my affidavit). The basis for this opinion is my awareness of the Oklahoma ballot access laws for independent candidates, and my awareness of the number of independent candidates who have appeared on the Oklahoma general election ballot for statewide office, and my election returns and general election ballots from Oklahoma. Also, of course, this opinion follows logically from the previous opinions.

The attached Curriculae Vitae contains a list of publications in the preceding ten year (other than my own newsletter, Ballot Access News, which is 17 years old). The attachment also includes a list of other cases in which I have testified as an expert at trial or by deposition. I will not be compensated for my study or testimony.

SIGNED /s/ Richard Winger 4 April 2002

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

No. 5:00-cv-01071 DEFENDANTS' TRIAL EXHIBIT
[Caption Omitted In Printing] NO. 8

24 May 2002

Effect of Allowing Republicans and Democrats to Vote in the Oklahoma Libertarian Primary

R. Darcy[1]

This report uses Oklahoma's experience in the August 22, 2000 Primary and November 2, 2000 General Election to examine the impact on the Libertarian Party nominations of allowing independents to vote in their primary; the impact on independent voter behavior of being offered a Libertarian primary ballot; and the effect on Republicans and Democrats and their primaries should registered Republicans and Democrats be offered the option of taking a Libertarian primary ballot. I also comment on the deposition of Richard Winger dated 5 October 2001. I begin with a brief outline of primary election regulation in Oklahoma.

Oklahoma Primary Elections

Abuse in the control over political party control resulted in California passing the first primary law in 1866. "The immediate occasion for the passage of the California law was the desperate struggle between the 'long hair' and

[1] R. Darcy is Regents Professor of Political Science and Statistics, Oklahoma State University. This Report was prepared in connection with Beaver v. Clingman, et al. CIV-00-1071-L U.S., District Court for the Western District of Oklahoma. CONTACT: bdarcy@okstate.edu

'short hair' factions of the Union party. This contest was accompanied by scenes of great violence, disorder, and glaring fraud, especially in San Francisco and Sacramento."[2] California's was an *optional primary* a political party could request. Wisconsin and Oregon adopted *mandatory primaries* in 1904.[3] These 1904 statutes shifted political parties from private organizations to organizations subject to state regulation.

Oklahoma Territory enacted a primary law in 1905. This law provided for an *optional primary* election if a political party requested it. The statute also provided for a *closed primary* to all but members of the party requesting the primary election.

> "That whenever the Central Committee of any political party in the Territory of Oklahoma, or any district or county or municipality therein shall decide to nominate by primary election any candidate or candidates for any offices, or elect any delegate or delegates to any political or constitutional convention, such Central Committee shall cause a notice thereof to be published for a period of not less than thirty (30) days next proceeding said primary election in some newspaper authorized by law to publish legal notices in the county or counties in which such primary election is to be held, or by posting a notice of such primary election in each precinct of the county, if

[2] Charles Edward Merriam and Louise Overacker. 1928. *Primary Elections* (Chicago: University of Chicago Press): 8; See also Ernst Christopher Meyer. 1902. *Nominating Systems: Direct Primaries versus Conventions in the United States* (Madison, Wisconsin: Meyer): 193-204.

[3] Edward McChesney Sait. 1939. *American Parties and Elections* Revised Edition (New York: Appleton-Century): 347.

there be no such newspaper published in said county."[4]

"In all cities or districts where registration is now or shall hereafter be by law required for general elections, no person shall be entitled to vote at the primary election unless registered for the last preceding election, or shall have registered after such preceding election and prior to such primary election.

It shall be the duty of the City Clerk of all cities of the first class in Oklahoma Territory to keep his office open from nine o'clock A.M., until six o'clock P.M., on the first Monday and Tuesday thereafter, and on the second Monday and Tuesday thereafter of the month next preceding the month in which the primary election shall be held for the purpose of registering the legal voters of said city."[5]

"If any person offering to vote is challenged as unqualified, one of the judges shall tender to him the oath provided by statute for general elections, and propound the question as in said statute provided, and if the vote is challenged on the ground that the voter does not belong to the political party whose ticket he is attempting to vote, they shall propound to him the following questions, to-wit:

[4] *Territory of Oklahoma Session Laws of 1905.* 1905 (Guthrie, Oklahoma: The State Capitol Company):245 Chapter 17 Article 2 Section I.

[5] *Territory of Oklahoma Session Laws of 1905.* 1905 (Guthrie, Oklahoma: The State Capitol Company):246 Chapter 17 Article 2 Sections 4-5.

'With which political party did you affiliate during the last general election?'

'With which political party do you intend to affiliate in the ensuing election?'

And after answering said questions, the challenge be not withdrawn, the judge shall require him to subscribe to the following oath.

'I do solemnly swear (or affirm) that I am a citizen of the United States, have been an actual, bonifide resident of the Territory of Oklahoma thirty days next preceding this election, and have been an actual resident of this precinct for the last thirty days, and have not yet voted at this election, and that I will be eligible to register and vote in the next election for which candidates are now being nominated. I further swear (or affirm) that I am a member of the. . . . party and intend to affiliate with that party at the coming election.'

'(Signed). . . . '

And any person, who shall refuse to subscribe to such oath shall not be entitled to vote at such primary election. The judges of such primary election are hereby authorized and empowered to administer such oath, and any person convicted of falsely swearing under such oath, shall be deemed guilty of a felony, and be punished as provided by statute for perjury."[6]

[6] *Territory of Oklahoma Session Laws of 1905.* 1905 (Guthrie, Oklahoma: The State Capitol Company):248-249 Chapter 17 Article 2 Section 13.

The 1906 Oklahoma Constitution did provide for the legislature creating a voter registration system and *mandatory primary* elections.

> "The Legislature shall enact laws providing for a mandatory primary system, which shall provide for the nomination of all candidates in all elections for State, district, county and municipal officers, for all political parties, including United States Senators: Provided, However, this provision shall not exclude the right of the people to place on the ballot by petition any non-partisan candidate."[7]

> " . . . the Legislature . . . may, when necessary, provide by law for the registration of electors throughout the State or in any incorporated city or town thereof, and, when it is so provided, no person shall vote at any election unless he shall have registered according to law."[8]

The 1907-8 legislature created voter registration *by political party* and set up a system of primaries. The registration was closed the Saturday before the Tuesday primary election. A primary voter could request the ballot of any political party, hence, it can be argued the legislature created an *open primary*.

> "It shall be the duty of the state election board to have prepared and printed for each city, at the expense of the State, proper registration certificate books and blank forms . . . The certificate

[7] *The Constitution of the State of Oklahoma*. 1906. (Oklahoma City, Oklahoma: Warden Printing Company):9-10 Article III Section 5.

[8] *The Constitution of the State of Oklahoma*. 1906. (Oklahoma City, Oklahoma: Warden Printing Company):10 Article III Section 6.

> above provided for shall be in form as follows, to-wit:
> Precinct No. ___ of ___ Ward ___ County ___This is to certify that ___ a person known me, has this day presented himself for registration as an elector in this precinct; that before issuing this certificate I require such person to answer such questions as propounded to him. He says that his name is as above written; that he resides in this precinct, at No. ___ street; he says his post office address is ___; that the color of his hair is ___, his eyes ___, his complexion ___ and politically he is a ___; that he refers to ___ as an owner of real estate who he says knows that he is entitled to vote in this Precinct."[9]

> "It shall be the duty of the election Inspector for each Precinct . . . beginning with the first day of July preceding each biennial primary election and continuing (Sundays excepted) until the hour of nine o'clock p.m. on the last Saturday night of said month of July, to keep open the Precinct registration book in his care as hereinafter provided, for the registration of any electors residing within such precinct and entitled to registration thereunder."[10]

> "Each voter shall designate which ticket he desires to vote and upon request, the election inspector shall deliver to the voter the ticket called

[9] *State of Oklahoma Session Laws of 1907-1908*. 1908 (Guthrie, Oklahoma: Oklahoma Printing Company):353-4; Samuel H. Harris, Jean P. Day and Clinton Orrin Bunn. 1912. *Revised Laws of Oklahoma 1910* Volume I (St. Paul, Minnesota: Pioneer).787.

[10] *State of Oklahoma Session Laws of 1907-1908*. 1908 (Guthrie, Oklahoma: Oklahoma Printing Company):352. N.B. The Primary was then scheduled for the first Tuesday in August – three days later.

> for. When the voter has made out his ballot he shall fold the same and hand it back to the inspector and in the presence of the voter the inspector shall deposit the ballot in the ballot box."[11]

In practice at least some election inspectors refused to allow anyone but registered or bona fide party members vote in party primaries. Such was the case for the August 2, 1910 Democratic primary in Oklahoma County. A criminal case developed when one inspector refused a Democratic Party primary ballot to someone who asked for it but was not a registered Democrat nor was he, in the opinion of the inspector, a bona fide Democrat. The Criminal Court of Appeals, acting as a Supreme Court, unanimously ruled in 1912 that Oklahoma's primary election law intended to exclude non-party members from voting in party primaries.

> "Upon careful consideration, we are of opinion that the constitutional provisions contemplate that only electors who are members of political parties shall participate in the primary election for the selection of candidates for the respective parties, and then vote only the ballot of the party of which they are a member, and that non-partisan electors having no party affiliations are relegated to their right to participate in the nomination of candidates for elective office by petition

[11] *State of Oklahoma Session Laws of 1907-1908.* 1908 (Guthrie, Oklahoma: Oklahoma Printing Company):361; Samuel H. Harris. Jean P. Day and Clinton Orrin Bunn. 1912. *Revised Laws of Oklahoma 1910* Volume I (St. Paul, Minnesota: Pioneer):746.

> in the manner provided for by the primary election law."[12]

The 1913 legislature, by restricting primary voters to the party with which they are registered or to which they are affiliated; ended whatever ambiguity remained. Oklahoma had a *closed primary.*

> "All persons who are qualified electors in this state or who may become such at the first election following such primary, may vote in any primary election; provided, that no person shall assist the nomination of more than one political party. Provided, every person who is known to be a member of any political party seeking to make nominations at said election, the election officers shall permit each elector to assist in the nomination of candidates for such party. Any elector not known to the judges, or known by them to have previously affiliated with some party other than that in which he now desires to participate in the selection of candidates, or whom may be challenged, as to party affiliations, shall be permitted to vote with such party only upon taking an oath that he is in good faith a member of the political party whose candidates he now seeks to assist in nominating, and with which he may be registered, or that it is his intention to support the nominees of the party in which he desires to participate at the coming regular election."[13]

[12] Ex parte Wilson, July 29, 1912. *The Pacific Reporter* volume 125 (St. Paul;, Minnesota; West):744.

[13] Elmer V. Jessee. 1916. *Primary and General Election Laws of the State of Oklahoma* (Oklahoma City, Oklahoma: State Election Board):10-11.

The 1916 legislature required change in party registration to be accomplished 90 days prior to the primary and made clear that persons were to vote only in the primaries of parties for which they were registered, although exceptions were provided for.

> "no change in registration shall be granted of change in politics unless application therefor be made at least ninety days before the next succeeding general primary election."[14]

> "No elector shall, at any primary election held in this State, vote the ballot of any political party of which he is not a member, or which he does not affiliate, and at any such primary election any elector may be challenged on that ground, and when so challenged no such elector shall be permitted to vote at any such primary election unless and until he shall first subscribe and swear to an oath that he is a member of, and does affiliate with, the political party in whose primary he seeks to vote."[15]

The 1913 closed primary system remained in effect through 1987. Consider, for example, the 1974 statutes.

> "No registered voter shall be permitted to vote in any Primary Election or Runoff Primary Election of any political party except the political party of

[14] *State of Oklahoma Session Laws of 1916.* 1916 (Guthrie, Oklahoma: Co-Operative Publishing Company): 41-42.

[15] *State of Oklahoma Session Laws of 1916.* 1916 (Guthrie, Oklahoma: Co-Operative Publishing Company): 46-47.

> which his registration form shows him to be a member."[16]

The 1987 legislature allowed political parties to permit registered independents to vote in primaries or runoff primaries in apparent response to a U.S. Supreme Court decision dealing with Connecticut's similar primary system.[17] This is the current statute.

> "No registered voter shall be permitted to vote in any Primary Election or Runoff Primary Election of any political party except the political party of which his registration form shows him to be a member, except . . . A recognized political party may permit registered voters designated as Independents . . . to vote in a Primary Election or Runoff Primary Election of the party."[18]

While there may be dispute over the meaning of the primary law passed by the 1907-8 legislature, strong argument can be made that Oklahoma has had a closed primary beginning in 1905 and continuing through 1987 when political parties, in response to a court decision, were permitted to allow independents to participate in the selection of their candidates.

[16] *Oklahoma Statutes 1981* Volume 2, 1981. (St. Paul, Minnesota: West):2503.

[17] *Tashjian v. Republican Party of Connecticut* 479 U.S. 208 (1986). Connecticut, like Oklahoma, had a closed primary. The Republicans wished to allow independents to vote in their primary.

[18] *Oklahoma Session Laws 1987.* 1987. (St. Paul, Minnesota: West):283-284; *Oklahoma Statutes 2001* Volume 3. 2001 (St. Paul, Minnesota: West):4224.

Effect on Libertarian Primary

The Libertarian Party permitted independent voters to vote in their August 22, 2000 primary. The only Libertarian contest was for Corporation Commissioner. There were 430 registered Libertarians.[19] The number of valid votes cast in the Libertarian primary was 2049.[20] There were also a number of under and over votes[21] making the total number of individuals taking Libertarian ballots greater than 2049. The primary election was relatively close, Boutin was 166 votes short of the majority needed to avoid a runoff; Prawdzienski was within 115 votes of taking second place, and a runoff position, from Bloxham. Assuming the 430 registered Libertarians all voted, they were swamped by a minimum of 1619 independents able to determine the outcome even if all Libertarians had agreed on a candidate. The effect of allowing independents to vote in a Libertarian primary was to make the independent vote decisive in the outcome.

Effect on The Independent Voter

What was the effect of making available Libertarian primary ballots on independent voters? On August 22, 2000 there was no statewide Republican, Democratic, or Reform primary. The only measure, which all voters could

[19] Author calculation from Trial Brief of Defendants 5 December 2001 page 4; 2049 votes cast, 1619 independents, therefore (2049 - 1619 =) 430 registered Libertarians August 22, 2000.

[20] *Election Results and Statistics 2000* (Oklahoma City: State Election Board, 2000):37.

[21] An under vote is when someone does not cast a valid vote in a contest. An over vote is when someone votes for more candidates than is permitted in a contest.

vote, was State Question 691 affecting vehicle registration fees and taxes. There were a number of legislative and United States House of Representatives primaries, however. Statewide it is impossible to determine how many voters in the primary were Republicans, Democrats, Libertarians, Reform, or independent. This is because there were precincts in which only the Libertarian primary and State Question 691 were being voted on. In those precincts no Republican, Democrat, or Reform ballots would be distributed and counted making an accurate count of participating Republican, Democrats and Reform party members impossible.[22]

There were Republican and Democratic primaries for U.S. House of Representatives in Districts 1 and 2, however.[23] Sixteen Oklahoma counties, contained wholly within one or the other of districts 1 or 2, had Republican and Democratic primaries in addition to the Libertarian. The independent turnout and the percent of independents voting who accepted a Libertarian ballot can be estimated in these sixteen counties.

The first problem is the number of voters registered to each political party. The State Election Board had the total number of registered voters as of August 22, 2000 but not the number of registered to each party at that date. I

[22] Separate Republican (yellow), Democratic (green), Libertarian (beige) and nonpartisan (white) ballots were used for all voting but counting machines did not distinguish them in vote tallies.

[23] Republicans also contested district 6 and Democrats also districts 4 and 5. There were no Reform Party Primaries. This analysis lumps the 78 registered Reform Party members (as of November 1) with the 63,785 independents. While the independents could vote n [sic] the Libertarian Primary, the Reform Party members could not.

used published registration as of November 1, 2000. This was about five percent over the August 22 figures in the sixteen counties of interest here. Using the November 1, 2000 Libertarian registration will overestimate the number of Libertarians by about seventy-five percent. The number of registered Libertarians is so small, however, and the number of independents voting in the Libertarian primary so large, this will not make a difference.

Each voter in the August 22, 2000 primary was handed a ballot with State Question 691. This totaled 190,906 in the sixteen counties of interest here. Each Democratic and Republican voter was given a ballot with their primaries, these totaled 186,112. Some were spoiled, undervoted (no vote cast) or overvoted (too many votes cast). Most registered a valid vote. Each registered Libertarian, if they all voted, a maximum of 251,[24] was given a libertarian primary ballot and, in addition, independents were offered one, in lieu of a nonpartisan ballot, for a total of 735 Libertarian ballots. If we assume all the registered Libertarians, as of 1 November 2000, voted then the number of independents, overall, that voted in the sixteen counties is:

SQ691 vote – (Democratic & Republican + Libertarian) = 190,906 - (186,112 + 251) = 4,543. The number of independents taking Libertarian ballots is the number of Libertarian ballots issued (735) minus the number of registered Libertarians (251) or 484. This is 10.65 percent of the independents voting ([485 ÷ 4543] x 100 = 10.65). If we assume no Libertarians voted the number of independents voting increases by 251 to 4,794 and the independents

[24] As of November 1, 2000.

voting in the Libertarian primary is 735 or 15.33 percent of independents voting ([735 ÷ 4543] x 100 = 15.33).

The true overall percent of independents taking Libertarian ballots is between 10.65 and 15.33 as some Libertarians voted but the number of available registered Libertarians in August was less then the number available in November. Under the assumption all Libertarians voted the percent of voting independents taking Libertarian ballots varied from 3.68 percent (Tulsa) to 41.67 percent (Okfuskee). Under the assumption of no Libertarian voting the percent of voting independents taking Libertarian ballots varied from 6.15 percent (Craig) to 41.67 percent (Okfuskee).

Table 1. Estimate of independents taking Libertarian ballot August 22, 2000 Oklahoma Primary in 16 counties

	Adair	Craig	Cherokee	Creek	Delaware	Haskell	McIntosh	Mayes	Muskogee
Registered									
Democrat	8234	7273	18720	22935	15602	8895	11991	15141	33270
Republican	4091	2110	6171	14309	7818	545	1922	6418	9422
Independent	818	566	2556	3344	2178	252	832	1568	4389
Libertarian	0	1	7	13	4	0	1	4	2
Reform	0	0	4	5	4	1	0	0	0
Total (01 11)	13143	9950	27458	40606	25606	9693	14746	23131	47083
Total (22 08)	*12768*	*9612*	*26266*	*38993*	*24100*	*9420*	*14383*	*22261*	*45782*
% increase	*2.94*	*3.52*	*4.54*	*4.14*	*6.25*	*2.90*	*2.52*	*3.91*	*2.84*
Vote									
Democrat	2773	3225	7585	6896	5971	3883	5118	5885	12027
Republican	886	651	1651	4112	2227	164	558	2034	2968
Libertarian	11	4	27	29	41	15	14	29	66
SQ691	3715	3941	9465	11258	8387	4092	5749	8077	15295
Independents*	56	64	222	237	185	45	72	154	298
Independents**	56	65	229	250	189	45	73	158	300
Ind* % Voting Lib	***19.64***	***4.69***	***9.01***	***6.75***	***20.00***	***33.33***	***18.06***	***16.23***	***21.48***
Ind** % Voting Lib	***19.64***	***6.15***	***11.79***	***11.60***	***21.69***	***33.33***	***19.18***	***18.35***	***22.00***

	Nowata	Okfuskee	Okmulgee	Ottawa	Rogers	Sequoya	Tulsa	Overall
Registered								
Democrat	4311	6158	18069	15462	24273	18493	149762	378589
Republican	2101	905	4739	5189	17244	3906	178781	265671
Independent	457	374	1741	2251	4035	1177	372257	63795
Libertarian	0	0	14	2	12	1	190	251
Reform	1	0	3	0	7	3	45	73
Total (01 11)	6870	7437	24566	22904	45571	23580	366035	708379
Total (22 08)	*6651*	*7314*	*23728*	*22600*	*42900*	*22691*	*345499*	*674968*
% increase	*3.29*	*1.68*	*3.53*	*1.35*	*6.23*	*3.92*	*5.94*	*4.95*
Vote								
Democrat	1133	2749	5721	5172	8524	6028	35840	118530
Republican	585	278	1321	136	5230	772	43009	67582
Libertarian	4	25	34	31	93	32	280	735
SQ691	1740	3087	7141	6447	14129	6901	81482	190906
Independents*	22	60	85	137	363	100	2443	4543
Independents**	22	60	99	139	375	101	2633	4794
Ind* % Voting Lib	***18.18***	***41.67***	***23.53***	***21.17***	***22.31***	***31.00***	***3.68***	***10.65***
Ind** % Voting Lib	***18.18***	***41.67***	***34.34***	***22.30***	***24.80***	***31.68***	***10.63***	***15.33***

*Assumes all registered Libertarians voted in Libertarian Primary
**Assumes no registered Libertarian voted in Libertarian Primary

Source: Author's calculations from data provided by State Election Board, April, 2002.

Impact on Republican and Democratic Primary Voters

How many registered Democrats or Republicans are likely to take Libertarian primary ballots should that be permitted? One possible assumption would be that the registered Democrats and Republicans would behave exactly like registered independents, in which case we would estimate this would be between 10.65 percent and 15.33 percent. But it would be a mistake not to note that these overall percents varied tremendously among the counties. This county variation suggests there are factors which can drive the number of registered independents, Republicans or Democrats taking Libertarian ballots, should that be permitted, up or down. In a given election the impact could be huge in one county's local races and minimal in similar races in another.

Supporting the assumption that registered Republican and Democrats would take Libertarian ballots in similar proportions as independents is the reasoning that independents took the Libertarian ballot not because they had an opinion on the relative merits of Richard Bloxham, Roger Boutin, jr., and Richard Prawdzienski and their programs for the Corporation Commission. Rather, the voters were confused, curious and contrary. We could assume registered Democrats and Republicans could be equally confused, curious and contrary. Voter confusion would manifest itself in undervoting with the Libertarian ballot. Undervoting would be a consequence of finding nothing of interest in the Libertarian primary portion of the ballot. Undervoting, in this case, would be returning a blank ballot on the Libertarian primary ballot proportion (there was only one Libertarian contest).

The minimum undervote in Republican and Democratic primary contests was just over four percent. We can assume many of these voted in other contests and the number of completely blank Republican and Democratic ballots was considerably under four percent of those handed out. The proportion of completely blank Libertarian primary portion of ballots, on the other hand, was over thirteen percent of those handed out. This indicates a considerable proportion of those asking for or given Libertarian primary ballots were confused or just curious. If we assume all registered Libertarians voted and none handed in a blank Libertarian primary ballot portion (undervoted) then twenty percent of the independents taking the Libertarian ballot handed it back with the Libertarian primary portion blank (97/484 x 100). The percent of Libertarian primary ballots turned in with the Libertarian primary portion blank varied from zero in Craig and Nowata to over twenty-seven percent in Mayes County.

We could assume independents took Libertarian primary ballots because there was no cost involved. They did not have to give up anything to take one. This would not be the case for voters registered as Republicans or Democrat. They would have to forgo their votes in the several primary contests of their party. *The assumption of the present litigation is that some registered Republicans and Democrats would be led to take a Libertarian primary ballot.* We can assume that a small percent of those doing so are motivated by a desire to see, say, Richard Bloxham, Roger Boutin, jr., or Richard Prawdzienski become the Libertarian Corporation Commission nominee – should they all run again, and are willing to forego their participation in their own party's primary to achieve that end. But we can assume a larger percent, probably a much

larger percent, would take the Libertarian ballot, in preference to their own party's, out of confusion or confusion mixed with curiosity. This would deprive them of their vote in their own party primary and likely affect the Republican and Democratic primary outcomes as well.

Table 2. Estimate of undervoting by party ballot August 22, 2000 Oklahoma Primary in 16 counties.

	Adair	Craig	Cherokee	Creek	Delaware	Haskell	McIntosh	Mayes	Muskogee
Vote									
Democrat	2773	3225	7585	6896	5971	3883	5118	5885	12027
Republican	886	651	1651	4112	2227	164	558	2034	2968
Libertarian	11	4	27	29	41	15	14	29	66
Minimum Undervote									
Democrat	14	33	104	183	62	63	48	206	208
Republican	22	20	40	83	52	1	17	40	31
Libertarian	1	0	6	1	5	2	3	8	4
Undervote %									
Democrat	0.50	1.02	1.37	2.65	1.04	1.62	0.94	3.50	1.73
Republican	2.48	3.07	2.42	2.02	2.33	0.61	3.05	1.97	1.04
Libertarian	9.09	0.00	22.22	3.45	12.20	13.33	21.43	27.59	6.06

	Nowata	Okfuskee	Okmulgee	Ottawa	Rogers	Sequoya	Tulsa	Overall
Vote								
Democrat	1133	2749	5721	5172	8524	6028	35840	118530
Republican	585	278	1321	1136	5230	772	43009	67582
Libertarian	4	25	34	31	93	32	280	735
Minimum Undervote								
Democrat	33	21	132	51	245	102	4763	6268
Republican	3	10	22	36	89	35	1024	1525
Libertarian	0	2	5	3	14	7	36	97
Undervote %								
Democrat	2.91	0.76	2.31	0.99	2.87	1.69	13.29	5.29
Republican	0.51	3.60	1.67	3.17	1.70	4.53	2.38	2.26
Libertarian	0.00	8.00	14.71	9.68	15.05	21.88	12.86	13.20

Source: Author's calculations from data provided by State Election Board, April, 2002.

Impact on Democratic and Republican Primaries

Table 3 shows the closeness of all 188 Republican and Democratic primary races across all seventy-seven counties. Over four percent were decided by less than one percent of the vote and over twenty-three percent by less than five percent. Almost half were decided by less than ten percent. Shifting those proportions of Republicans or Democrats away from their primary can and will affect Democratic and Republican primary outcomes.

Table 3. Closeness of Republican and Democratic August 22, 2000 Primary races

Race Decided By:*	Federal & Legislative Number	Percent	County Number	Percent	Overall Percent
Less than 1%	3	5.66	5	3.70	4.26
1-5%	6	11.32	30	22.22	19.15
5-10%	7	13.21	38	28.15	23.94
Over 10%	37	69.81	62	45.93	52.66
Total	**53**	**100.00**	**135**	**100.00**	**100.00**

*In two person race the percent over 50; in multiple candidate races the lesser of the percent necessary to avoid a runoff or produce a different runoff candidate

Source: Author's calculations from *Daily Oklahoman* August 23, 2000 page 15-A (County); *Oklahoma Election Results and Statistics 2000* (Federal & Legislative)

Hypothetical Example of Effect of Defection to Libertarians on Democratic Primary Results

I will illustrate the effect of opening the Libertarian primary ballot to Republicans and Democrats on the Republican or Democratic primary assuming certain parameters and structures. Let us assume 10,000 Democratic primary voters belongs to a minority (whatever that might mean) with probability .2 and to a majority with .8. We assume Minority voters will, if given the opportunity, defect to the Libertarian primary with probability .15 and Majority voters with probability .025. The net defection to the Libertarians, if given the opportunity, will be five percent of the voting Democrats. We assume two Democratic primary candidates, Smith and Jones. We assume the Minority vote for Smith with probability .29 and Jones with probability .71, should they be on the voter's ballot; the Majority vote for Smith with probability .55 and Jones with probability .45. Finally, we assume probability of defecting to the Libertarian primary and favored Democratic primary candidate are statistically independent. Table 4 presents these hypothetical parameters showing the outcome of the Democratic primary is a function of defections to the Libertarian primary. Of course, It would be a simple matter to hypothesize other parameters or assumptions that will have defection to the Libertarians not affect the hypothetical primary outcome.

Table 4. Effect on Hypothetical Democratic Primary of a Five Percent Defection to Libertarians Under Various Assumptions.

Proportion of Minority Defecting		Proportion Minority of Democrats		Proportion of Majority Defecting		Proportion Majority of Democrats		Proportion of Democrats Defecting Minority		Proporation of Democrats Defecting Majority		Total
.15	x	.20	+	.025	x	.80	=	.03	+	.02	=	.05
(votes)								300	+	200	=	500

Votes for Smith and Jones in Democratic Primary under assumption *no* Democrats defect to Libertarians – Jones wins.

	Minority Votes	Minority Percent	Majority Votes	Majority Percent	Total	Percent
Smith	580	29%	4400	55%	4980	49.8
Jones	1420	71	3600	45	5020	50.2
Total	2000	100	8000	100	10000	100

Votes for Smith and Jones in Democratic Primary under assumption fifteen percent of Minority and two and one half percent of Majority Democrats defect to Libertarians – Smith wins.

	Minority Votes	Minority Percent	Majority Votes	Majority Percent	Total	Percent
Smith	493	29%	4290	55%	4783	50.3
Jones	1207	71	3510	45	4717	49.7
Total	1700	100	7800	100	9500	100

Source: Author's calculations

Examples of Oklahoma Voters Confused by Election Procedures

Voters depend on election officials to speed them accurately through the voting process. When the election system confuses voters their chances of recording their preferences are reduced. This is particularly true for minority voters, those inexperienced with the voting system, and those with low educational accomplishments. But voter confusion is by no means limited to these groups. For example, in 1989 my colleague Anne Schneider and I published an analysis of rolloff[25] in Oklahoma County. We found printing races on the back of a ballot caused Judicial Retention rolloff to jump 18.25 in white majority precincts and 31.42 percent in African-American majority precincts.[26]

The 2000 general election provided further examples of voter confusion among partisans caused by electoral arrangements. The Democratic and Reform parties did not offer any candidates in the Third Congressional District yet voters were provided a Federal Officer straight party Democratic and Reform vote. In Payne County, entirely within the Third District, 3,162 voters used the Democratic straight party provision.[27] If we assume these were all confused Democrats and if we further assume the 9,319 votes Al Gore and Joe Lieberman collected in Payne

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[25] Failure of the voter to complete all ballot races or questions, produces undervotes.

[26] R. Darcy and Anne Schneider, 1989. "Confusing Ballots, Roll-Off, and the Black Vote," *Western Political Quarterly* 42 (September):358.

[27] Author's calculations from date provided by Payne County Election Board.

County[28] were all the voting Democrats, then one-third of the voting Democrats were confused into tossing away their votes. Thousands more in other Third District counties did the same thing. They voted for parties with no candidates.

In Oklahoma County, state house districts 82 and 100 had no Democratic candidates, yet the straight party provision attracted 3,567 uncounted Democratic votes. Some voters may also have voted for one of the actual candidates but many were lured into throwing votes away. It would take a hand count to tell how many. Around the state, uncounted votes were cast for Libertarians where there were no Libertarian candidates, for the Reform Party where there were no Reform candidates and for Democrats where there were no Democratic candidates. Some of this voting may have been the product of some careful and informed voter calculation. Most of it is due to voters confused by the ballot, which offered them something that would, in practice, deprive them of a vote rather than record their preference.

Comment on Deposition of Richard Winger 5 October 2001.

Richard Winger states:

> "California election law nurtures minor parties. At the same time, California election law makes it very difficult for independent candidates to get on the ballot. Oklahoma law is the opposite. Oklahoma election law makes it virtually impossible

[28] Oklahoma State Election Board. 2000. *State of Oklahoma Election Results and Statistics 2000* (Oklahoma City, Oklahoma):44.

> for minor parties to thrive, but Oklahoma election law makes it very easy for independent candidates (for office other than president) to get on the November ballot. As a result, minor parties in California are relatively successful and have a fair amount of prestige, and are in danger of being infiltrated by opportunistic persons who merely want to use the party to enable themselves to win a place on the general election ballot. There is no such danger for minor parties in Oklahoma; such opportunistic persons use the lenient independent candidate position procedures."[29]

First, we can notice Oklahoma voters do no favor minor party candidates preferring even one-shot and obscure independents.[30] When minor parties are on the Oklahoma ballot their candidates generally do not fare as well as independent candidates in the same race. This is shown in Table 5 which looks at all partisan races on the November 7, 2000 ballot in Oklahoma involving minor party or independent candidates. In each race having both an independent and minor party candidates, US House districts 3 and 5, the independent candidate gained an average of over six percent of the vote while the Libertarian candidate averaged less than three percent of the vote. Oklahoma voters shun Libertarian candidates when they have the opportunity to vote for them. Table 6 shows independent candidates average over three times the vote of Libertarian candidates. The Libertarian Party has

[29] Affidavit of Richard Winger, Plaintiffs' Exhibit 4 page 2 paragraph 6.

[30] Ross Perot as an independent Presidential candidate in 1992 gained 319,879 Oklahoma votes (23 percent), in 1996, as a Reform Party candidate, he gained 130,788 (10 percent).

existed in Oklahoma since 1980. To this date they have not found a way to communicate their message or candidates to the voters, or they *have* communicated their message and candidates and Oklahoma voters are not interested.

Oklahoma voters gave Argus W. Yandell over twice the votes for Congress in the Third District they gave the Libertarian candidate. Although on the ballot as an independent, Yandell campaigned as a candidate of the 'Southern Party' pledged to secede Oklahoma from the Union. I doubt many of the 14,660 votes he gained were from those who knew anything of his program or him. They were just avoiding the Republican and Libertarian candidates. But if we do assume voters were knowledgeable, then Yandell, with an impractical message, little effort, little money, and no visible organization, did far better than the Libertarians. A strong case can be made that it is not the ballot laws that motivate candidates to run as independents in Oklahoma. Some candidates realize their chances are better without the burden of a minor party label.

Table 5. Oklahoma Minor Parties and Independents: Nov. 2000 General Election

Registration November 1, 2000		
Independent	200204	8.96
Libertarian	701	0.03
Reform	251	0.01
Total	2233602	100.00
U.S. President		
Electors for	Number	Percent
Buchanan (Rfm)	9014	0.73
Browne (L)	6602	0.53
Total	1234229	100.00

U.S. Representative District 1		
Clem (L)	2984	1.49
Total	200005	100.00
U.S. Representative District 2		
Mavis (L)	6467	3.31
Total	195412	100.00
U.S. Representative District 3		
Mavis (L)	6730	4.23
Yandell (I)	14660	9.21
Total	159216	100.00
U.S. Representative District 4		
Ducey (Rfm)	4897	2.79
Johnson (L)	1979	1.13
Total	175684	100.00
U.S. Representative District 5		
Murphy (L)	2658	1.36
Maguire (I)	5930	3.03
Total	196022	100.00
U.S. Representative District 6		
Cristiano (L)	2435	1.51
Total	161176	100.00
Corporation Commission		
	Number	Percent
Bloxam (L)	21568	1.84
Total	1173285	100.00
Senate District 41		
Duffe (L)	698	1.87
Total	37350	100.00
House District 44		
Lein (L)	290	2.37
Total	12222	100.00
House District 74		
Daniel (L)	169	1.06
Total	15882	100.00

House District 82		
Galfin (L)*	2003	12.03
Total	16650	100.00
House District 100		
Powell (L)*	1556	14.72
Total	10570	100.00
Cleveland County Clerk*+		
Combs (I)	20611	34.06
Total	60516	100.00
Pottawatomie County Sheriff		
Jones (I)	1028	4.73
Total	21719	100.00

*Only other candidate; no Democratic Candidate (I) Independent; (L) Libertarian; (Rfm) Reform +72 of 75 precincts Source: Author's calculations from data reported in *State of Oklahoma Election Results and Statistics 2000* (Oklahoma City: State Election Board, 2000); *Daily Oklahoman* November 8, 2000 page 7-A "Local Issues."

Table 6. Mean Votes for Minor Party and Independent Candidates November 7, 2000 General Election

Group	Mean Vote Percent	Number
Libertarian	3.65	13
Reform	1.76	2
Independents	12.76	4

Source: Author's calculations from Table 5.

Second, Richard Winger claims that in Oklahoma, in contrast to California, 'opportunistic persons' will file as independents rather than 'infiltrate' minor political parties. The facts contradict his reasoning. In April 2000,

when I met her, Susan Ducey was campaigning for the Fourth District Republican congressional nomination. She told me J.C. Watts, the Republican incumbent, was not Republican or conservative enough. The card she gave me is shown below. By the time she filed it was as a Reform Candidate. Her calculations led her to make use of the Reform place on the ballot. Candidates will strategically file as independents, in a minor party, or in a major party primary, even in Oklahoma.

April, 2000 Susan Ducey Campaign Card

Third, it is difficult to measure what Richard Winger means by 'nurture' and 'thrive' when he contrasts California's nurturing election laws to those in Oklahoma where minor political parties have difficulty thriving.[31] One measure, however, might be the Libertarian Party performance in Presidential elections over the past two decades. This is shown in Table 7 below.

[31] Richard Winger testified in California in 1997 in California Democratic Party, et al. vs. Bill Jones. Secretary of State CIV S-2038 US District Court for the Eastern District of California. He was asked if a minor party ever won a contested partisan election in California and he responded the last time was 1936 (page 614 line 15). The last time a minor party won a contested partisan general election in Oklahoma was 1914 when five Socialists were elected to the state house and one to the state senate. Oklahoma does not keep track of county and municipal partisan elections so I have no information in that regard. Nevertheless, since 1936 – 66 years – minor parties have not thrived, by this measure, in either state, regardless of the election or ballot law differences.

Table 7. Libertarian Percent of Presidential Vote in California and Oklahoma 1980-2000.

Year	California	Oklahoma
1980	1.70	1.20
1984	0.50	0.70
1988	0.70	0.50
1992	0.40	0.30
1996	0.70	0.50
2000	0.46	0.50
Average	0.73	0.62
r	-0.67	-0.74
b	-0.04	-0.03
% Decline 1980-2000	-76.47	-58.33

Source: Author's calculations from *Guide to U.S. Elections,* 1994 (Washington, D.C.: Congressional Quarterly):465-468; *State of Oklahoma Election Results and Statistics* (Oklahoma City: State Election Board) 1980, 1984, 1988, 1992, 1996, 2000; State of California Secretary of State Election Website.

By 2000 the Libertarian Presidential candidate gained a larger percent of the Oklahoma than the California vote. The slope of a regression line calculated for each state (the year as the x variable, the Libertarian vote percent the y variable) shows a steeper decline (four one hundredths of one percent per year) in California compared to Oklahoma (three one hundredths of one percent per year). Over twenty years the decline is an estimated 0.8 percent in California and 0.6 percent in Oklahoma. If 1980 and 2000 are compared, by 2000 the Libertarians lost 76.47 percent of their 1980 California Presidential vote and only 58.33 percent in Oklahoma.

There was one November 7, 2000 statewide race in California, the United States Senate, one in Oklahoma, the Corporation Commission. Libertarians contested each gaining 1.76 percent of the California United States Senate vote and 1.83 percent of the Oklahoma Corporation Commission vote.[32] The Libertarians did better, not worse, in Oklahoma statewide, compared to California.

There are the fifty-two California races for the United States House of Representatives and the six similar races in Oklahoma. The best that any Libertarian did in Oklahoma races with both Republican and Democratic candidates[33] was 3.309 percent while a Libertarian managed 6.3 percent in one California race and 3.3, 3.6 and 3.8 percent in three other California races. But overall, the House elections do not show a thriving Libertarian party nurtured by California's election laws in sharp contrast to a bleak Oklahoma situation. As Table 8 shows, most California Libertarian House candidates did worse than the best achieved in Oklahoma. Further, Libertarians contested all Oklahoma House districts compared to only eighty-seven percent of the California districts.

[32] Author's calculations from *State of Oklahoma Election Results and Statistics 2000* (Oklahoma City, Oklahoma: State Election Board); State of California Secretary of State Election Website.

[33] I exclude races without both major party candidates as minor parties collect exaggerated 'protest' votes absent major party candidates.

Table 8. Libertarian Vote for Congress: Oklahoma and California 2000

Seats	Percents California	Oklahoma
Libertarian Contested with Republican & Democrat		
Libertarian Gained More than 3.30%	7.69	16.67
Libertarian Gained Less than 3.30%	71.15	66.67
Libertarian Contested without Republican or Democrat	7.69	16.67
No Libertarian	13.46	0.00
Total	**100.00**	**100.00**
N	51	6

Source: Author's calculations from *State of Oklahoma Election Results and Statistics 2000* (Oklahoma City: State Election Board); State of California Secretary of State Election Website.

Finally, there are the state legislative races. Libertarians contested a larger portion of the California than the Oklahoma legislative races and their best performance there was better than their best performance in Oklahoma (Table 9). In neither state, however, did the Libertarians threaten to actually win a contest.

Table 9. Libertarian Performance in 2000 California and Oklahoma State Legislative Races

	Percent Contested		Best Vote Percent*	
Chamber	**California**	**Oklahoma**	**California**	**Oklahoma**
Assembly-House	65.00	2.97	8.2	1.0
Senate	75.00	4.17	5.1	1.8

*Includes only races with both a Republican and Democratic party candidate.

There were no Libertarians in state senate races without Republican and Democratic party candidates. In a California assembly race without a Democrat a Libertarian gained 24 percent of the vote and in Oklahoma Libertarian state house candidates without Democrats in the race gained 12 percent and 14 percent of the vote.

Source: Author's calculations from *State of Oklahoma Election Results and Statistics 2000* (Oklahoma City: State Election Board); State of California Secretary of State Election Website.

By important indicators of party performance, votes for its presidential candidate, votes in statewide races, votes for United States House of Representatives, Oklahoma's election laws, rather than California's, have better nurtured the Libertarians and allowed them to thrive as best they could. There are other years that can be looked at and other races. Some will show California Libertarians doing better than their brothers and sisters in Oklahoma. And of course, California and Oklahoma differ in far more than election regulation and some of these factors, undocumented and unanalyzed by Richard Winger, rather than elections or

ballot laws, are determining the fate and fortunes of the Libertarian Party in Oklahoma and California.

/s/ Bob Darcy

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

No. 5:00-cv-01071 DEFENDANTS' TRIAL EXHIBIT

[Caption Omitted In Printing] NO. 9

SUPPLEMENTAL REPORT OF RICHARD WINGER

This second supplemental report is to be used as an update of my affidavit in *Beaver v. Clingman*, case number CIV-00-1071-L, in the Western District of Oklahoma.

2002 Primary Election in Utah

Utah held a primary on June 25, 2002, which had characteristics somewhat similar to the type of primary Oklahoma will be holding in the future, assuming the Libertarian Party of Oklahoma is permitted to invite all registered voters into its primary, and assuming it gets on the Oklahoma ballot in 2004. In the Utah primary of 2002, no one but registered Republicans and registered independents were permitted to vote in the Republican primary. But all registered voters were permitted to vote in the Democratic primary. Utah has no statewide offices up for election in 2002. The office at the top of the ballot in Utah in 2002 is U.S. House of Representatives. Of Utah's 3 congressional districts, only in the First district was a primary held for both the Democratic nomination and the Republican nomination.

In the Republican primary in the First congressional district, 42,237 valid votes were cast for member of Congress. In the Democratic primary in the same district, for the same office, 13,959 valid votes were cast. Therefore, for Congress, 1st district, 75.2% of the primary voters voted in the Republican primary, and 24.8% of the primary voters

voted in the Democratic primary. Both primaries were two-person contests.

In August 2002, there were 252,230 registered Republicans and only 60,495 registered Democrats in Utah. Of Utah voters who are registered in either one of those two parties, 80.7% are registered Republicans and only 19.3% are registered Democrats.

The Utah Democratic party is markedly weaker than the Utah Republican Party. However, the Utah Democratic Party, by inviting all voters to vote in its primary, succeeded in attracting a higher percentage of voters to vote in its primary, than its share of the two-party registration in Utah. In other words, the Utah Democrats have only 19.3% of the two-party registrants, yet attracted a primary vote of 24.8%. In my opinion, the Utah Democratic Party acted rationally by inviting all registered voters to vote in its primary.

Although the Libertarian and Green Parties are also qualified parties in Utah this year, no primary was held for them in 2002 since there were no offices for which more than a single individual was seeking those parties' nominations.

My sources of information for Utah are official primary election returns from the Utah State Elections office, and official registration figures, obtained from each Utah county.

Comment on Report of Dr. Robert Darcy of 23 May 2002

The Report seems to say that the Oklahoma Libertarian Party has as much support as the California Libertarian

Party. However, these specific indicators of party strength show that the California Libertarian Party is far stronger than the Oklahoma Libertarian Party:

1. There were only 171 registered Libertarians in Oklahoma, the last time the Oklahoma State Election Board tallied them, in January 2002[1]. In California there were 89,736 registered Libertarians, last time the California Secretary of State tallied them, October 7, 2002. Although California has a population nine times larger than Oklahoma, the ratio of registered Libertarians in Oklahoma, to California, is one to 525!

2. Only one Libertarian Party member holds public office in Oklahoma; 64 Libertarian Party members hold public office in California. The California list includes the Mayor of Moreno Valley (a city of over 100,000 population), the District Attorney of Mendocino County, one of the 5 County Supervisors in Calaveras County, and the Mayor of Saratoga.

3. Only 9 Libertarians are running for public office in Oklahoma in the November 5, 2002 election[2], whereas 348 Libertarians are running for public office in California in that election. Incidentally, Oklahoma has more state legislators than California does.

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[1] The Board will have new figures early in November, 2002, according to the person who answered the telephone at the State Board of Elections on October 29, 2002.

[2] The Libertarian Party candidates who are running for partisan public office on November 5, 2002, are all dues-paying members of the party. However, they are registered "independent", because Oklahoma election law does not permit independent candidates to be registered "Libertarian", even when the Libertarian Party is not recognized.

My sources of information are the websites of the California Libertarian Party, the Oklahoma Libertarian Party, the California Secretary of State, and the Oklahoma State Election Board.

The Report of Dr. Darcy points out that in the presidential elections of 1984 and 2000, the Libertarian Party presidential candidate received a higher percentage of the vote in Oklahoma than in California. This is probably because California voters had more choices on their presidential ballots than Oklahoma voters did. For instance, in the November 2000 election, Oklahoma voters were unable to vote for Ralph Nader, because his name did not appear on the ballot and Oklahoma is one of only five states that bans all write-in votes. Undoubtably [sic] many voters who desired to vote for Ralph Nader in Oklahoma, frustrated that they could not do so, voted for the Libertarian Party presidential candidate instead. In California, there were 7 presidential candidates on the November 2000 ballot (including Ralph Nader), as well as a write-in space.

The Report of Dr. Darcy mentions Susan Ducey, a congressional candidate in 2000 who first planned to run in the Republican primary, but instead opted to run in the Reform Party primary. The Report says Susan Ducey ran in the Reform Party primary for strategic reasons. However, the Report reprints her calling card, which says that she is "conservative" and "pro life". During the 2000 campaign, the Reform Party nominated Patrick Buchanan for president, who was adamently [sic] "pro life" and "conservative", and the Reform Party platform was amended to include a pro-life plank and many other conservative planks. Therefore, it would seem Susan

Ducey joined the Reform Party out of conviction, and not just to gain a place on the ballot.

SIGNED /s/ Richard Winger Oct 29, 2002

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

No. 5:00-CV-01071

[Caption Omitted in Printing]

PLAINTIFFS'
TRIAL EXHIBIT
NO. 1

NEW RULES FOR VOTING IN THE OKLAHOMA PRIMARY AND RUN-OFF ELECTIONS IN THE YEAR 2004

1. Voters registered as Republicans may vote in either the Republican **or** Libertarian Primary Election.

2. Voters registered as Democrats may vote in either the Democratic **or** Libertarian Primary Election.

3. Voters registered as Libertarians, Reform, or Independent may **only** vote in the Libertarian Primary Election.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

No. 5:00-CV-01071

[Caption Omitted in Printing]

PLAINTIFFS'
TRIAL EXHIBIT
NO. 2

NEW RULES FOR VOTING IN THE OKLAHOMA PRIMARY AND RUN-OFF ELECTIONS IN THE YEAR 2004

1. In the Democratic Primary Election, only registered Democratic voters may vote.

2. In the Republican Primary Election, only registered Republican voters may vote.

3. In the Libertarian Primary Election, any registered voter may vote.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

ANDREA L. BEAVER, et al., Plaintiffs,	)	
v.	)	Case No. CIV-00-1071-F
MICHAEL CLINGMAN, Secretary of the Oklahoma State Election Board, et al., Defendants.	)	

AMENDED PROPOSED FINAL PRETRIAL REPORT

(Filed Nov. 25, 2002)

All counsel who will appear at trial:

Appearing for Plaintiffs: James C. Linger

Appearing for Defendants: Wellon B. Poe, Jr., Assistant Attorney General, Office of the Attorney General.

JURY TRIAL ___ NONJURY TRIAL _X_

1. BRIEF PRELIMINARY STATEMENT. State *briefly* and in ordinary language the facts and positions of the parties (appropriate for use during jury selection in jury cases).

All the Plaintiffs are citizens of the State of Oklahoma and the United States of America, registered voters of the State of Oklahoma, and wish to have the right to cast their vote in future Libertarian Primaries to be held in Oklahoma. The instant case involves the opening up of the Libertarian Primary and Run-off elections in Oklahoma to all registered voters whether they be Libertarian,

Independent, Republican, Democratic, or Reform. The Libertarian Party of Oklahoma has passed resolution to open up their future Primary and Run-off elections to all Oklahoma registered voters.

The Defendants are the Oklahoma State Election Board, its Secretary, and its members. The Defendants oppose the Libertarian Party of Oklahoma being given the option to open up its Primary and Run-off elections in Oklahoma to registered members of other political parties because the Defendants feel that it would be disruptive and affect the integrity of other political parties and their primary elections.

2. JURISDICTION. The basis on which the jurisdiction of the Court is invoked.

This is an action for declaratory and injunctive relief. The basis on which the jurisdiction of the Court is invoked is pursuant to tit. 28 U.S.C. §§ 1343(3), 1343(4), 2201, and 2202, and tit. 42 U.S.C. § 1983. Venue of the Court is invoked pursuant to tit. 28 U.S.C. § 1391. The rights, privileges, and immunities sought to be declared and redressed are those secured by the First and Fourteenth Amendments to the United States Constitution.

3. STIPULATED FACTS. List stipulations as to all facts that are not disputed or reasonably disputable, including jurisdictional facts.

1. All parties are properly before the Court.
2. All parties have been correctly designated.
3. Venue of this Court is properly invoked.

4. In the year 2000, the filing period for political party nominations in the State of Oklahoma was on July 10, 11, and 12, 2000.

5. In the year 2000, the filing deadline for contesting a political party's candidates in the State of Oklahoma was by July 14, 2000, at 5:00 p.m.

6. In the year 2000, the political party Primary Election in the State of Oklahoma was held on August 22, 2000. In-person absentee voting began August 17, 2000.

7. In the year 2000, the Run-off Election in the State of Oklahoma was held on September 19, 2000.

8. In the year 2000, the General Election in the State of Oklahoma was held on November 7, 2000.

9. At present, an Oklahoma voter may only register to vote as Republican, Democratic, Reform, Libertarian, or Independent.

10. Only Oklahoma voters registered as Republicans may vote in the Republican Party Primary Election. This is by designation of the Oklahoma Republican Party.

11. Only Oklahoma voters registered as Democratic may vote in the Democratic Party Primary Election. This is by designation of the Oklahoma Democratic Party.

12. The Reform Party has allowed Oklahoma voters who are registered as Reform or Independents to vote in the Reform Party Primary Election. This is by designation of the Oklahoma Reform Party. However, the Reform Party has never had a Primary or Run-off Election contest in the State of Oklahoma.

13. The Libertarian Party, pursuant to Oklahoma statutes, allows Oklahoma voters who are registered as Libertarian or Independents to vote in the Libertarian Party Primary Election. This is by designation of the Oklahoma Libertarian Party. The Libertarian Party would like to allow all Oklahoma voters, regardless of their political affiliation, to vote in Libertarian Party Primary Elections.

14. On May 31, 2000, the Voter Registration and Ballot Access Coordinator for the Libertarians in the State of Oklahoma turned in a designation to the Secretary of the Oklahoma State Election Board notifying the Oklahoma State Election Board that the Libertarian Party of Oklahoma consented to voting by all registered Oklahoma voters – whether they were Libertarian, Independent, Republican, Democratic, or Reform – to vote in the Libertarian Primary and Run-off Elections in the State of Oklahoma for the year 2000.

15. On May 31, 2000, Lance Ward, then Secretary of the Oklahoma State Election Board, accepted the Libertarian Party of Oklahoma's request that Independents could vote in the Libertarian Party Primary and Run-off Elections in the year 2000, but did not accept said designation from the Libertarian Party of Oklahoma as to permitting Republican, Democratic, Reform, or any other recognized political party or political association voters voting in the Libertarian Party Primary and Run-off Elections for the State of Oklahoma for the year 2000.

16. On June 21, 2000, the Libertarian Party of Oklahoma was notified that it had achieved political party status in the State of Oklahoma pursuant to OKLA. STAT. tit. 26, § 1-108. Prior to June 21, 2000, the Libertarian

Party of Oklahoma was recognized as a political organization pursuant to OKLA. STAT. tit. 26, § 1-109(B).

17. There were 141 registered Libertarian Party voters in the State of Oklahoma as of November 5, 1996.

18. In the year 1996, the Libertarian Party of Oklahoma permitted independent voters to vote in the Libertarian Primary Election conducted on August 27, 1996. The total vote cast in the Libertarian Primary Election for United States Senator on August 27, 1996, was 2,940 votes. Since only Libertarians and Independents could vote in the Libertarian Party's Primary, and since there were no more than 141 registered Libertarian Party voters, the vote in the Libertarian Party's Primary Election on August 27, 1996, for United States Senator, means that at least 95% of the voters casting votes in the aforesaid Libertarian Party Primary Election were Independent voters.

19. There are currently more than 2,100 voting precincts in the State of Oklahoma. Pursuant to OKLA. STAT. tit. 26, §§ 2-123 and 1-128.1, each precinct must have a minimum of three officials working an election, totaling more and [sic] 6,300 precinct workers working each election.

20. Oklahoma statutes require that the Oklahoma Election Board provide training for all members and employees of each county election board every two years. In addition, each precinct official is to receive in-person training every two years. The training conducted by the State Election Board and each respective County Election Board for the 2000 election cycle has already been completed.

21. There were 360 registered Libertarian party voters in the State of Oklahoma as of June 30, 2000.

22. In the year 2000, there was no political party Primary Election conducted for the Reform Party in Oklahoma.

23. In the year 2000, the only statewide political party Primary Election conducted in the State of Oklahoma on August 22, 2000, involved the Libertarian Party Primary for Corporation Commissioner.

24. There were three candidates for the Libertarian nomination for Corporation Commissioner in Oklahoma at the Primary Election to be conducted on August 22, 2000, to-wit: Richard Prawdzinski of Edmond, Oklahoma; Whitney L. Bootin, Jr. of Norman, Oklahoma; and Roger Bloxham of Tulsa, Oklahoma.

25. There were no statewide Primary Elections for the Republican or Democratic parties of Oklahoma for the Primary Election held on August 22, 2000.

26. In the year 2000, the Republican Party held Primary Elections in the State of Oklahoma on August 22, 2000, for United States Representative for Districts 1, 2, 4, and 5, but not in Districts 3 and 6.

27. In the year 2000, the Democratic Party held Primary Elections in the State of Oklahoma on August 22, 2000, for United States Representative for Districts 1, 2, and 6, but not in Districts 3, 4, and 5.

28. There were several Primary and Runoff Elections conducted by the Republican and Democratic parties in various State Senate and State House of Representative

districts in Oklahoma in 2000 as well as local county and municipal races.

29. Preparation and setup for the 2000 Primary Election ballots began on July 13. Lance Ward, then Secretary of the Oklahoma State Election Board, expected ballot proofing to begin no later than July 18 and ballot printing for the 2000 Primary to begin no later than July 20.

30. That the Libertarian Party of Oklahoma has passed By-laws and Resolutions which permit all registered Oklahoma voters – whether they be Republican, Democratic, Reform, Independent, or Libertarian – to vote in any Primary or Run-off Election conducted by the Libertarian Party in any election in the year 2000 or in any future Primary or Run-off Election conducted in the State of Oklahoma.

31. If the Libertarian Party of Oklahoma were allowed to open its Primary Election to all voters at the individual voters choice, each voter would only be able to receive one ballot selection in order to cast his or her vote.

32. The Libertarian Party of Oklahoma has been on the Oklahoma ballot in every presidential election from 1980 through 2000, and has had primary elections in 1980, 1996, and 2000.

33. There were 770 registered Libertarian voters in the State of Oklahoma as of January 15, 2001.

34. The Libertarian Party of Oklahoma is currently recognized as a political organization in the State of Oklahoma pursuant to OKLA. STAT. tit. 26, § 1-109(B).

35. There were 286 registered Libertarian voters in the State of Oklahoma as of November 1, 2002.

36. In the year 2004, the Primary Election will be held on August 24, 2004, the Run-off Election will be held on September 21, 2004, and the General Election will be held on November 2, 2004.

The following facts, though not admitted, will not be contested at the trial:

37. The Libertarian Party of Oklahoma feels that it would be advantageous to it as a political party and important to its members and all voters of Oklahoma if their rights to political association and political speech pursuant to the First and Fourteenth Amendments to the United States Constitution were furthered by opening up the Libertarian Party Primary and Run-off Elections to all Oklahoma voters regardless of political affiliation.

38. The Libertarian Party of Oklahoma and its members feel that opening up of the Libertarian Party of Oklahoma's Primary and Run-off Elections would help them reach out to Libertarian oriented voters of other political affiliations, produce a more viable Libertarian candidate for the General Election, create favorable publicity for the Libertarian Party, and encourage further expansion and growth of the Libertarian philosophy. It has also been the experience of most Libertarians that many individuals not formally affiliated with the Libertarian Party share Libertarian views on certain issues so as to support the advancement of common political objectives favored by the Libertarians.

39. There are a number of voters in the State of Oklahoma who are registered in political parties other

than the Libertarian Party who wished to vote in the Libertarian Party's Primary and Run-off Elections in the State of Oklahoma in the year 2000 and wish to vote in future Primary and Run-off Elections to be conducted by the Libertarian Party.

40. The Libertarian Party of Oklahoma intends to seek political party recognition in the State of Oklahoma, pursuant to OKLA. STAT. tit. 26, § 1-108, and run candidates for elective office in the election to be conducted in Oklahoma in the year 2004.

41. There are a number of Libertarians who are interested in running in Libertarian Primaries to be conducted in the State of Oklahoma in the year 2004. Among these individuals are Roger Bloxham, Lynn Atherton, and Robert Murphy, all of whom desire to seek the Libertarian nomination for U.S. Senator from Oklahoma in the year 2004.

4. LEGAL ISSUES. State separately, and by party, each disputed legal issue and the authority relied upon.

Plaintiffs:

a. Whether OKLA. STAT. tit. 26, Sec. 1-104 is unconstitutional under the First and Fourteenth Amendments to the U.S. Constitution to the extent that it does not allow a political party to permit registered voters other than members of the political party in question and Independent voters to vote in a political party's primary and run-off elections in Oklahoma.

b. Whether the Plaintiffs herein are entitled to have OKLA. STAT. tit. 26, Sec. 1-104 declared unconstitutional to the extent that it prevents the Libertarian Party of Oklahoma from opening its Primary and Run-off elections

to registered Oklahoma voters who are not registered as either Libertarian or Independent.

Authority relied upon: United States Constitution, Amendments I and XIV; tit. 42 U.S.C. § 1983; OKLA. STAT. tit. 26, § 104; *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1996); *California Democratic Party v. Jones*, 530 U.S. 567 (2000); *Cool Moose Party v. State of Rhode Island*, 183 F.3d 80 (1st Cir. 1999).

Defendants:

a. Whether the challenged election statutes are unconstitutional as written and/or applied.

b. Whether Plaintiffs are entitled to the declaratory and injunctive relief as requested in their Amended Complaint.

Authority relied upon: United States Constitution, Amendments I and XIV; OKLA. STAT. tit. 26, § 1-104. *California Democratic Party v. Jones*, 530 U.S. 567 (2000); *Rosario v. Rockefeller*, 410 U.S. 752 (1973); *Storer v. Brown*, 415 U.S. 724 (1973).

5. CONTENTIONS AND CLAIMS FOR DAMAGES OR OTHER RELIEF SOUGHT.

A. Plaintiffs:

1. Declaring that the said required actions which prevent the Libertarian Party of Oklahoma from allowing registered voters who are not members of the Libertarian Party or Independent voters from voting in the Libertarian Primary and Run-off Elections in Oklahoma, pursuant to OKLA. STAT. tit. 26, §§ 1-104(A) and 1-104(B)(4) are illegal and unconstitutional, particularly as applied to the facts in the case at bar, in that they are in violation of the

First and Fourteenth Amendments to the U.S. Constitution and Title 42 U.S.C. § 1983.

2. Entering a permanent injunction restraining, prohibiting, and enjoining the Defendants to the instant action, their agents, employees, and servants, and all persons in active concert and participation with them, from enforcing, applying, or implementing the aforesaid complained of state election laws as applied to the instant Plaintiffs and all similarly situated individuals who wish to vote in any Primary or Run-off Election conducted by the Libertarian Party in Oklahoma.

3. Awarding Plaintiffs reasonable costs and expenses in this action, including attorney fees pursuant to the Civil Rights Attorney Fees Awards Act of 1976, 42 U.S.C. § 1988; and

4. Granting Plaintiffs such other relief as to which they may be entitled and which the Court may deem equitable and just.

B. Defendants:

Defendants contend that none of the statues challenged in this action are unconstitutional as written and/or applied and that Plaintiffs are not entitled to any declaratory or injunctive relief or any attorneys' fees, costs or any other relief.

6. EXHIBITS. The following exclusionary language *MUST* be included:

Exhibits not listed will not be admitted by the Court unless good cause be shown and justice demands their admission.

A. Plaintiffs

Number	Title/ Description (Pre-marked for trial)	Objection	Federal Rule of Evidence Relief Upon
1.	New Rules for Voting in the Oklahoma Primary and Run-off Elections in the Year 2004 (by registration);	Yes	402
2.	New Rules for Voting in the Oklahoma Primary and Run-off Elections in the Year 2004 (by primary);	Yes	402
3.	Curriculum Vitae of Richard Winger	Yes	801,802
4.	Expert Reports of Richard Winger	Yes	801,802
5.	Deposition of Robert Darcy, for impeachment purposes		

B. Defendants

Number	Title/ Description (Pre-marked for trial)	Objection	Federal Rule of Evidence Relief Upon
1.	Oklahoma State Election Board 1996 election results for all state, county or local primaries, runoffs and general elections		
2.	Oklahoma State Election Board 1998 election results for all state, county or local primaries, runoffs and general elections		

3. Oklahoma State Election Board 2000 election results for all state, county or lo l primaries, runoffs and general elections

4. Oklahoma State Election Board 2002 election results for all state, county or local primaries, runoffs and general elections

5. Oklahoma State Election Board voter registration/political party affiliation totals for all 1996 election cycles

6. Oklahoma State Election Board voter registration/political party affiliation totals for all 1998 election cycles

7. Oklahoma State Election Board voter registration/political party affiliation totals for all 2000 election cycles

8. Oklahoma State Election Board voter registration/political party affiliation totals for all 2002 election cycles

9. Transcript of proceedings in *California Democratic Party, et al. v. Jones*, Case No. CIV-S-96-2039 (E.D. Ca.)

10. Transcript of hearing on Preliminary Injunction in *Beaver, et al. v. Ward, et al.*, Case No. CIV-00-1071-F

11. Transcript of testimony of Richard Winger in *California Democratic Party, et al v. Jones*, Case No. CIV-S-96-2039 (E.D. Ca.)

12. Expert report prepared on behalf of Defendants by Robert Darcy — Yes — 801,802

13. Curriculum Vitae of Robert Darcy — Yes — 801,802

14. Rules of the Oklahoma State Election Board

15. Oklahoma State Election Board statutory provisions
    - 12A. 26 O.S. § 101
    - 12B. 26 O.S. § 102
    - 12C. 26 O.S. § 103
    - 12D. 26 O.S. § 104
    - 12E. 26 O.S. § 107
    - 12F. 26 O.S. § 108
    - 12G. 26 O.S. § 109
    - 12H. 26 O.S. § 110

16. Deposition of Robert Darcy

17. Deposition of Richard Winger, for impeachment purposes.

7. WITNESSES. The following exclusionary language *MUST* be included.

No unlisted witness will be permitted to testify as a witness in chief except by leave of Court when justified by exceptional circumstances.

A. Plaintiffs:

1. Richard P. Prawdzienski, Chairman of the Oklahoma Libertarian Party; testimony as to future Libertarian primaries;

2. Robert T. Murphy (if necessary), past Chairman of the Oklahoma Libertarian Party; testimony as to past and future Libertarian party primaries;

3. Steve Galpin (if necessary); testimony as to future Libertarian primary elections;

4. Floyd Turner (if necessary); testimony as to desire to vote in Libertarian primary elections; and

5. Richard Winger, expert witness on election law, ballot formats, primary elections, differences in state election laws as to primary elections, and effects of open and closed primary elections.

Name Address Proposed Testimony

B. Defendants:

1. Michael Clingman, Secretary, Oklahoma State Election Board, c/o Wellon B. Poe, Rules of the State election Board, state statutes; primary Oklahoma election results, effect of open primary on voters, candidates, political parties and primary and runoff elections.

2. Jay Parmley (if necessary), Chairman, Oklahoma Democratic Party; effect of open party primary on Democratic Party primary and run-off voter turnout and results.

3. Chad Alexander (if necessary), Chairman, Oklahoma Republican Party; effect of open party primary on Republican Party primary and run-off voter turnout and results.

4. Lance Ward, former Secretary of Oklahoma State Election Board, c/o Wellon B. Poe; prior election results; state statutory provisions; rules of State Election Board; effect of open primary on political parties, voters, candidates and primary and runoff elections.

5. Carol Slater (if necessary), Oklahoma State Election Board, c/o Welton B. Poe; prior election results; state statutory provisions, rules of State Election Board.

6. Robert Darcy, Oklahoma State University, will provide expert testimony as to the effects of primaries on Democratic, Republican and Libertarian Parties.

8. ESTIMATED TRIAL TIME For liability N/A
For damages N/A One and one half day

9. BIFURCATION REQUESTED: Yes ___ No X

10. POSSIBILITY OF SETTLEMENT:

Good ___ Fair ___ Poor X

All parties approve this order and understand and agree that this order supersedes all pleadings, shall govern the conduct of the trial, and shall not be amended except by order of this Court.

/s/ James C. Linger
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APPROVED this ___ day of November 2002.

STEPHEN P. FRIOT
UNITED STATES DISTRICT
JUDGE

(3)

No. 04-37

Supreme Court, U.S.
FILED
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In The Supreme Court of the United States

MICHAEL CLINGMAN, GLO HENLEY, KENNETH MONROE, THOMAS PRINCE AND THE OKLAHOMA STATE ELECTION BOARD,

Petitioners,

v.

ANDREA L. BEAVER, FLOYD TURNER, MINELLE L. BATSON, MARY V. BURNETT, MICHAEL L. SEYMOUR, TERRY L. BEAVER, ROBERT T. MURPHY, SHARON LYNN ATHERTON, ROGER BLOXHAM, STEVE GALPIN, RICHARD P. PRAWDZIENSKI, MICHAEL CLEM, WHITNEY L. BONTIN, JR., CHRISTOPHER S. POWELL, CHARLES A. BURRIS AND THE LIBERTARIAN PARTY OF OKLAHOMA A/K/A LIBERTARIAN POLITICAL ORGANIZATION,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF PETITIONERS ON THE MERITS

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QUESTIONS PRESENTED FOR REVIEW

I. Whether Oklahoma's semi-closed primary election law – which allows a political party to invite non-affiliated voters but not voters registered with another political party to vote in its partisan primary but prevents a voter registered with another political party from voting in that primary – violates the First Amendment rights of a political party and its members to associate.

II. Whether the decision in *California Democratic Party v. Jones*, 530 U.S. 567 (2000) requires that a State allow a political party, at its option, to open its political party primary election to any registered voter regardless of that registered voter's political affiliation.

III. Whether the Tenth Circuit Court of Appeals erred in finding that the State of Oklahoma's restrictions constituted a severe burden on the right of association of the political party thereby requiring the regulation to be narrowly tailored to meet a compelling state interest or whether the appropriate standard is the balancing test which has been applied in election cases before this Court.

PARTIES TO THE PROCEEDINGS

The parties to this proceeding on Petition for Writ of Certiorari are:

Petitioners herein:

Michael Clingman, Secretary of the Oklahoma State Election Board
Glo Henley, Chairman of the Oklahoma State Election Board
Kenneth Monroe, Vice Chairman of the Oklahoma State Election Board
Thomas E. Prince, Member of the Oklahoma State Election Board
and Oklahoma State Election Board

Defendants in the District Court and Appellees in the United States Court of Appeals for the Tenth Circuit

Respondents herein:

Andrea L. Beaver, Floyd Turner, Minelle L. Batson, Mary V. Burnett, Michael L. Seymour, Terry L. Beaver, Robert T. Murphy, Sharon Lynn Atherton, Roger Bloxham, Steve Galpin, Richard P. Prawdzienski, Michael A. Clem, Whitley L. Bontin, Jr., Christopher S. Powell, Charles A. Burris and the Libertarian Party of Oklahoma a/k/a Libertarian Political Organization

Plaintiffs in the District Court and Appellants in the United States Court of Appeals for the Tenth Circuit

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BRIEF OF PETITIONERS

Michael Clingman, Glo Henley, Kenneth Monroe, Thomas Prince and the Oklahoma State Election Board submit this Brief on the Merits on behalf of Petitioners.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit is reported as *Beaver v. Clingman*, 363 F.2d 1048, 120 A.L.R. 5th 707 (10th Cir. 2004). (*See* Pet. App. 1-23[1].)

The opinion of the United States District Court for the Western District of Oklahoma, Case No. CIV-00-1071-F, is unreported. (*See* Pet. App. 24-73.)

STATEMENT OF JURISDICTION

The Judgment of United States Court of Appeals for the Tenth Circuit was entered on April 6, 2004. The Petition for Certiorari was filed on July 2, 2004. The Petition for Certiorari was granted on September 28, 2004.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

[1] "Pet. App." refers to the Appendix to the Petition for Certiorari. "J.A." refers to the parties' Joint Appendix. "R.T." refers to the reporter's transcript. "App." refers to the Appendix to the Brief of Petitioners. "Pl. Ex." refers to trial exhibits of Respondents/Plaintiffs. "Def. Ex." refers to trial exhibits of Petitioners/Defendants.

STATUTORY AND CONSTITUTIONAL PROVISIONS

The text of the First Amendment to the Constitution of the United States, the Fourteenth Amendment to the Constitution of the United States and 42 U.S.C. § 1983 are reproduced at Pet. App. 2-3. The key provisions of the Oklahoma Election statutes, 26 O.S.A. § 1-104 is reproduced at App. 2-3.

The key provision of 26 O.S.A. § 1-104 states in pertinent part:

> A. No registered voter shall be permitted to vote in any Primary Election or Runoff Primary Election of any political party except the political party of which his registration form shows him to be a member, except as otherwise provided by this section.
>
> B.1. A recognized political party may permit registered voters designated as Independents pursuant to the provisions of § 4-112 of this title to vote in a Primary Election or Runoff Primary Election of the party.

Title 26 § 4-119 of the Oklahoma Statutes is set forth at App. 9.

The relevant portion of 26 O.S.A. § 4-119 states:

> Any registered voter may make application under oath to change political affiliation by executing a form prescribed by the Secretary of the State Election Board at any time . . . [E]xcept during the period from June 1 through August 31, inclusive, in any even-numbered year.

STATEMENTS

A. Factual Background

Prior to 1987, the Oklahoma primary election system was a closed primary system in which only voters registered as a member of a political party could vote in that political party's primary and primary runoff elections. Following the decision in *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), the Oklahoma legislature amended its primary election statutes to comply with that ruling and established a semi-closed primary system in which a political party could decide to allow unaffiliated voters, designated in Oklahoma as "independent" voters, to participate in that political party's primary. 26 O.S.A. § 1-104 (App. 2.) Oklahoma law remains that no voter registered as a member of one political party could vote in another political party's primary or runoff elections.

The decision to allow independent voters is a decision made by the particular party and must be made known to the Oklahoma State Election Board during the month of November in the year prior to the election year, or in the odd numbered years prior to the primary election. Although the change in the statutes was enacted in 1987, no political party chose to open its primary elections to independents until 1996 at which time the Libertarian Party of Oklahoma decided to allow independents to vote in its primary. Only the Libertarian Party, in 1996 and 2000, has permitted independents to vote in its primaries. There was no Libertarian Party primary in 2004.

Oklahoma primary elections are held on the last Tuesday in July of each even-numbered year. 26 O.S.A. § 102 (App. 1.) All necessary runoff elections are held on the fourth Tuesday of August in that same year. 26 O.S.A.

§ 103 (App. 1.) A voter may change his political affiliation up until June 1 immediately preceding the primary elections. He may not change his political affiliation between June 1 and August 31, after the primary runoff election.[2] 26 O.S.A. § 4-119 (App. 9.)

In order to retain status as a recognized political party with the ability to run candidates under the party designation and conduct primary elections, a political party must garner at least ten percent (10%) of the votes cast for the highest office being contested. 26 O.S.A. § 1-109 (App 4-5.) Oklahoma's election for the Office of Governor is conducted during the even-numbered years between the Presidential election years.

Because it failed to garner sufficient voter support in the 1992 Presidential election, the Libertarian Party successfully petitioned in 1996 for recognized political party status. By obtaining recognized political party status, the Libertarian Party Organization was able to run candidates under its banner and conduct primary elections. As of primary election day 1996, there were no more

[2] As of 2004, the Oklahoma primary elections are currently held on the last Tuesday of July of each even-numbered year. 26 O.S. Supp. 2003 § 1-102. The runoff primary elections are held on the fourth Tuesday of August. 26 O.S. Supp. 2003 § 1-103. The final date to change voter affiliation prior to the primary and runoff elections is June 1 of that same year. 26 O.S. Supp. 2003 § 4-119. At the time this action was filed, the Oklahoma primary elections were held on the fourth Tuesday of August of each even-numbered year with the runoff primary elections being conducted on the third Tuesday of September. 26 O.S.A. 1991 §§ 1-102, 1-103. At that time, the last date to change voter affiliation prior to the primary and runoff primary elections was July 1 of that same year. 26 O.S.A. 1991 § 4-119. While the deadline to change party affiliation and the date of the primary elections have changed, the deadline date has remained the same relative to the primary election.

than one hundred forty-one (141) Libertarian Party members registered and eligible to vote in the Libertarian Party primary. Two thousand nine hundred and forty (2,940) votes were cast in the Libertarian party primary, indicating that at least 2,799 more independents than Libertarian Party Organization party registrants voted in the primary. (Pet. App. 31, J.A. 90.) No Libertarian Party runoff election was conducted although runoff elections were conducted in the other political parties.

The Libertarian Party Organization's presidential candidate did not garner sufficient voter support in the 1996 presidential election and the Libertarian Party Organization lost its status as a recognized political party. The Libertarian Party Organization did not attempt to gain recognized political party status for the 1998 election cycle.

In 2000, the Libertarian Party Organization again successfully petitioned for recognized political party status and had one contested election during the primary elections. Although there were only three hundred sixty (360) voters registered as Libertarian Party members and eligible to vote in the Libertarian primary election, two thousand forty-nine (2,049) votes were cast in that primary indicating that at least one thousand six hundred nine (1,609) more independent voters voted than eligible registered Libertarian Party members. (Pet. App. 32, J.A. 91.) No Libertarian Party runoff election occurred in 2000 although runoff elections were conducted in the other political parties.

Prior to that 2000 election, the Libertarian Party requested the Oklahoma State Election Board to not only allow independents but to also allow registered Democrats

and Republicans to vote in the Libertarian Party primary election. After the Oklahoma State Election Board denied that request, the Libertarian Party and several individual voters filed suit alleging the Oklahoma restrictions were unconstitutional.

B. Proceedings Below

Respondents filed the complaint seeking to enjoin the State of Oklahoma from enforcing its primary election statutes prohibiting the participation of voters affiliated with other political parties from voting in the Libertarian Party primary and seeking a declaration that the Oklahoma election scheme was an unconstitutional infringement on Respondents' First Amendment rights to political association. The district court conducted a hearing on Respondents' request for preliminary injunction prior to the 2000 primary elections. The district court denied Respondents' request.

The district court then conducted a two-day non-jury trial in December, 2002. The district court awarded judgment to the Petitioners. (Pet. App. 24-73.) The district court found that the burden imposed by the State of Oklahoma's primary election scheme was not severe and that the election laws imposed only reasonable, non-discriminatory restrictions triggering a less exacting review. Under that lesser standard, the court determined that the State's regulatory interests sufficiently outweighed any burdens caused by the restrictions and found that the restrictions were constitutionally valid.

The Tenth Circuit Court of Appeals reversed the decision of the District Court. 363 F.3d 1048, 1061. (Pet. App. 1-23.) The Court of Appeals concluded that the

burden imposed was severe and that the statutory scheme could survive only if it was tailored to meet a compelling state interest. The Court of Appeals concluded that the interests asserted by Petitioners were not compelling state interests and reversed the district court's finding that the statutory scheme was unconstitutional.

SUMMARY OF ARGUMENT

In each two year election cycle, Oklahoma elects one hundred one (101) State House of Representatives members, twenty-four (24) State senators and five (5) United States congressmen. Depending on the year, presidential or statewide offices as well as a United States Senate race may be on the ballot.

The political primaries related to those elections are conducted in July of each even-numbered year with any necessary runoff elections being conducted in August. Oklahoma has determined that a semi-closed primary system, one in which a political party may invite independents to vote in its primary elections, is the election system which best meets the State's interests. However, in spite of the State's regulatory authority and interests, the decision of the Court of Appeals subjects State election laws to the whims of a political party, notwithstanding legitimate state interests to the contrary. The Court of Appeals incorrectly determined that the State of Oklahoma must allow a political party, if that party so chooses, to open its primary election to any registered voter, including any voter registered as a member of a different political party. This is in direct conflict with the teachings of

Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997).

The ruling also has effectively, and incorrectly, eliminated a State's right to require party registration prior to a primary election. Although the State provided legitimate interests its regulations are intended to support, the Court of Appeals rejected all interests put forth by the State and eliminated the affiliation requirement. This violates the express directives of *Rosario v. Rockefeller*, 410 U.S. 752 (1973).

The decision of the Court of Appeals establishes that a state may not, to any extent, mandate the manner in which the party chooses its candidates within the framework of a state-sponsored and regulated election. The Court of Appeals, which based its decision on *California Democratic Party v. Jones*, 530 U.S. 567 (2000), creates a situation where a state cannot exert any control over a political party unless that political party acquiesces. It will cause all primary elections to be open – but only if the party so chooses. This ruling will allow a political party to change its primary election scheme from election to election based solely on the desires and whims of the party's controlling officers and the perceived political expediency of that time. The opinion of the Court of Appeals improperly extends *Jones* to require the state to allow a political party to choose which type of primary it wishes to hold, without concern for the consequences to the voting public or state entity.

Finally, the Court of Appeals incorrectly applied a strict scrutiny standard of review against the State's interests which preordained the unconstitutionality of Oklahoma's and many other States' election laws. The

Court of Appeals imposed virtually insurmountable burdens on the Petitioners when it demanded proof of a compelling State interest. Even after requiring a compelling State interest, the Court of Appeals ignored the interests provided by the Petitioners – interests which this Court has previously determined are sufficient State interests to withstand a challenge to its election laws.

The issue in this case is not whether open or closed primaries better promote the goals of effective, responsible and democratic government. The issue is whether the State of Oklahoma and other States that have determined that a semi-closed primary is the preferred primary election system have sufficient interests and should continue to have the authority to regulate primary elections or whether election regulations are appropriate only if such regulations are met with the approval of the political parties.

ARGUMENT

I.

A SEMI-CLOSED POLITICAL PRIMARY DOES NOT EXCEED A STATE'S REGULATORY AUTHORITY OR VIOLATE A POLITICAL PARTY'S OR INDIVIDUAL VOTER'S RIGHT TO POLITICAL ASSOCIATION.

Under Oklahoma law, a candidate for partisan public office may gain access to the general election ballot through two methods. The candidate may file as an independent, or in the most common manner, may receive the nomination of a recognized political party by winning that party's primary election. Oklahoma conducts a semi-closed primary election system whereby a political party may invite unaffiliated or independent voters to vote in its

primary elections, but persons registered as members of a political party may not vote in another party's primary elections. The Court of Appeals improperly determined that the restrictions imposed by a semi-closed primary system amounted to an abuse of Oklahoma's regulatory power and an unconstitutional infringement on the associational rights of voters and the political parties.

A. A State Has Broad Authority In Regulating Elections And Protecting The Integrity Of The Election Process.

Primary elections are purely statutory creatures whose purpose is to determine nominees from a political party who will run for office in a general election. As such, states have important interests in regulating the primary elections including, but not limited to the interests of protecting the integrity of its political process from frivolous or fraudulent candidates. *See Democratic Party of U.S. v. Wisconsin, ex rel. Lafolette*, 450 U.S. 107 (1981). Within the frame of its regulatory power, a state is free to conduct the primary elections and limit its participation in those elections as the state sees fit, so long as the state's regulatory action does not violate any provisions of the United States Constitution. *See Smith v. Allwright*, 321 U.S. 649 (1944).

A political party has appropriately and succinctly been identified as a "voluntary association, instituted for political purposes, with the goal of effectuating the will of its members. The party's ultimate goal, in the electoral process, is to obtain control of the leverage of government by winning elections, so that it may then put into operations and philosophies." *Nader v. Schaffer*, 417 F.Supp. 837, 844 (D. Conn. 1976) *summarily aff'd*, 429 U.S. 989

(1976) (citation omitted). In order to accomplish those goals, the political party will seek to nominate candidates who are most likely to win a general election while remaining faithful to the policies and philosophies of the party and its members.

It has long been recognized that the selection of nominees by political parties plays a crucial role in the electoral system. Indeed the nomination of candidates by the political parties has often been called the "most critical stage" of the electoral process. Without doubt, the political party's selection of its candidates is an ultimate and crucial element of the party members' activities. *Id.*

The goal of the political party is to effectuate the will of its members on the public as a whole. *Ray v. Blair*, 343 U.S. 214, 222 (1952). In order to accomplish these goals, it is important for the political party to nominate candidates who are and will remain faithful to the ideas of that political party.

However, while it is well settled that political parties enjoy freedom of association under the First Amendment, it is just as well recognized that a State has a legitimate interest in protecting those associational rights, not only of the party and its members but also other parties and their members, from intrusion by voters with adverse political principles. *Id.* at 221-222 (1952).

A state has a substantial and legitimate interest in protecting the manner in which elections are conducted and in protecting the overall integrity of the historic electoral process. It has been recognized that this interest includes preserving the political parties as viable and identifiable interest groups and insuring that the results of primary elections accurately reflect the voting of the

political party's members. Indeed, parties should be able to avoid primary election outcomes which would tend to confuse or mislead the general voting population to the extent the general electorate relies on party labels as representative of certain ideologies. "There must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974).

A state has comprehensive election authority which extends to primaries and voter registration and qualifications. *Id.* In fact, "in facilitating the effective operation of a Democratic government, a state might reasonably classify voters or candidates according to political affiliations . . . " *Nader v. Shaffer*, 417 F.Supp. at 845-46, quoting *Ray v. Blair*, 343 U.S. 214, 226 n. 14 (1952). It is within the province of the state to choose the primary election scheme that it believes will best promote democratic, electoral and governmental goals, so long as the election scheme does not improperly infringe on any voter's constitutional rights. While a state's choice of a primary election scheme is not immune from judicial review, the review should not evolve into "some amorphous general supervision of the operation of government." *United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J. *concurring*).

> Both the right of free political association and the State's authority to establish arrangements that assure fair and effective party participation in the election process are essential to democratic government. Our cases make it clear that the accommodation of these two vital interests does not lend itself to bright-line rules but requires careful inquiry into the extent to which the one or the other interest is inordinately impaired under the facts of the particular case.

Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 234 (1986) (Scalia, J. *dissenting*) *citing Anderson v. Celebreeze*, 460 U.S. 780, 788-90 (1983) and *Storer v. Brown*, 415 U.S. 724, 730 (1974).

The issue before this Court is not whether open or closed primaries better promote the goals of effective, responsible and democratic government in a state. In fact, the comparative merits of the various forms of primary election systems has been widely debated for years by both this Court and the public in general. The issue is whether a State may continue to regulate primary elections in a manner it determines meets with that State's interests.

A state should not be denied its choice of a primary election system simply because it may not conform to the systems of other states or be able to please all political factions in the State. The fundamental concern in election law is not the interests of the candidate but the interests of the voters who choose to associate together to express their support. *Anderson v. Celebreeze*, 460 U.S. 780 (1983).

The Constitution provides that States may prescribe the time, place and manner of holding elections. U.S. Con., Art. 1, § 4; *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). Common sense, as well as constitutional guidelines, compels a conclusion that the government must play an active role in the structuring of elections. *Id.* In fact, as a political matter, there must be substantial regulation of the election process if the elections are to be fair and honest and to ensure that order, and not chaos, accompanies the democratic process. *Id.*

The mere fact that a State's election system creates laws tending to limit the field of candidates from which voters may choose does not of itself compel strict scrutiny. Instead, a more flexible standard of weighing the burden imposed against the State's interest applies. *Id.* at 434.

B. The Oklahoma Semi-Closed Primary Law Does Not Violate Any Right Of Association Rights As A Voter Affiliated With Another Political Party Should Not Be Considered To Have Established An Association By Merely Desiring To Or Casting A Vote In Another Party's Primary Election.

The Respondents allege that the State statutes improperly affect the Libertarian Party's as well as the individual's right of association. *Tashjian* recognized this limited interaction as an association between the party and the voter. That association, however, was limited by *Tashjian* to independents and the political party because the voters who were registered as independents had not formed any affiliation or association with any other particular political party.

The desire to vote or even the mere act of actually voting in a political party's primary or for a particular candidate should not be viewed as forming an association. The voter has already formed a public association with another political party by registering as a member.

> Appellees' only complaint is that the party cannot leave the selection of its candidate to persons who are not members of the Party, and are unwilling to become members. It seems to me fanciful to refer to this as an interest in freedom of association between members of the Republican Party and putative independent voters. The

> Connecticut voter who, while steadfastly refusing to register as a Republican, casts a vote in the Republican primary, forms no more meaningful an "association" with the Party than does the independent or the registered Democrat who responds to questions by a Republican Party pollster. If the concept of freedom of association is extended to such casual contacts, it ceases to be of any analytic use.

Tashjian, 479 U.S. 208, 235 (Scalia, J., *dissenting*).

This tenuous "association" is exactly what Respondents believe they are entitled to have recognized and protected. The Libertarian Party Organization has not requested a change in registration rules in order for a voter to become affiliated with the Libertarian Party Organization. The non-Libertarian Party Organization Respondents testified that there was no intent to become affiliated with the Libertarian Party Organization even though they allege a desire to vote in a Libertarian Party primary. In fact, Floyd Turner, the only non-Libertarian party member who testified at the trial in this matter, admitted that he could register as a member of the Libertarian Party but stated that he would not disaffiliate from the Democratic Party, of which he was a registered member and register as a Libertarian. (R.T. 75-76). His purpose was to vote for one candidate he knew. Of course, nothing would have prevented Mr. Turner from voting for that candidate at the general election.

As noted by Justice Scalia in his dissent in *Tashjian*, this "association" is no association at all. It does nothing to promote the political party. And, the basis for desiring to vote in the Libertarian primary could just as easily be due to a sinister reason instead of a legitimate reason. The

association alleged in this case is even questionable, especially where the voter has already formed a public association with another political party by registering as a member. Under this scenario, the voter has already established with which group he wants to be associated. This should not be considered an "association" for which the State cannot reasonably regulate.

Oklahoma's semi-closed primary does not impede any voter's freedom of association. Any voter is lawfully entitled to associate with any political party and participate in that political party's primary elections by merely declaring party affiliation as part of the voter registration process. To do so or not do so is a decision made solely by the voter.

C. The Purported Basis For Desiring A Semi-Open Primary Of Providing A Voice Or Other Opportunities To Disenfranchised Or Unsatisfied Voters Is An Inadequate Legal Reason To Require The Party-Option Open Primary.

At trial and on appeal to the Court of Appeals the Libertarian Party Organization has hypothesized that the opening of its primary elections will help in providing a voice to disenfranchised or unsatisfied voters. Respondents have offered evidence as to the limited number of contested primary elections over the past few election cycles in the Democratic and Republican parties as well as the overall percentage of registered voters who have not voted in the primary elections. Respondents allege that opening its primary will provide an opportunity to vote that a registered Republican or Democrat may not otherwise have. The Court of Appeals even based its opinion on the belief that the Libertarian Party Organization's request

constituted an appropriate consideration in allowing Oklahoma's voters additional choices in primary voting.

This Court has specifically rejected that argument in *Jones*, 530 U.S. 567, 583 (2000). One purported basis for the creation of the California blanket primary law was to provide party members who lived in soft or uncontested districts an opportunity to vote in primary elections where they would not otherwise have the opportunity to vote. Those "disenfranchised" voters included minority party members and independent voters who would not have a primary in which to vote. The *Jones* decision directly addressed this finding that such voters were not disenfranchised. If the voter felt compelled to vote in one particular party's primary, that voter had the choice to join that party. Any decision to do so or not do so is the decision of that particular voter. The public affiliation of registering as a party member is the truest, simplest and most basic form of association.

The argument for providing additional choices fails in this case also. No registered voter in Oklahoma is prevented from voting in the general election. The fact that there may be only one candidate from a party thereby not requiring a primary election is not the result of any action by the State but the failure of a political party to field more than one candidate for office. This purported interest of a political party, in this case, the Libertarian Party of Oklahoma, is not sufficient legal cause to require a State to allow voters affiliated with one party to vote in another political party's primary election. The Court of Appeals' reliance on this party interest was incorrect.

II.

OKLAHOMA HAS LEGITIMATE STATE INTERESTS IN REQUIRING PARTY REGISTRATION PRIOR TO A PRIMARY ELECTION AND THE ELIMINATION OF ANY PARTY REGISTRATION REQUIREMENTS, AS EFFECTIVELY ACCOMPLISHED BY THE OPINION OF THE COURT OF APPEALS, RUNS AFOUL OF THIS COURT'S PRIOR HOLDINGS.

Election statutes requiring prior party affiliation and placing time restrictions on voter registration are a proper exercise of a state's regulatory authority. *Rosario*, 410 U.S. 752 (1993). These restrictions may take the form requirements to affirmatively affiliate with a party or disaffiliate with one party prior to voting in another party's primary elections. Election statutes requiring some form of prior affiliation with a political party in order to vote in its primary and runoff elections are generally designed to prevent four types of individuals from voting in party primaries:

> (1) Voters generally affiliated with another party but wishing to cross over to a rival party's primary to support a weak candidate who is likely to lose in the general election to the nominee of the voters' preferred party (raiders);
>
> (2) Voters generally affiliating with another party but wishing to cross over to support their preferred primary candidate in case the nominee of the voters' own party loses the general election (second choice supporters);
>
> (3) Voters generally affiliating with another party but wishing to cross over to support a candidate preferred over any potential nominee of the voters' own party (crossovers); and
>
> (4) Voters generally not affiliating with any party but wishing to support a particular party candidate (independents).

Developments In The Law – Elections, 88 Harv. L. Rev. 1111, 1164 (1975).

In its opinion, the Court of Appeals stated that the issues in this case fell directly between the issue in *Tashjian* and *Jones*. In fact, the ruling of the Court of Appeals establishes that no state regulation will withstand a challenge by a political party or its membership on restrictions to voter qualifications of primary elections. That ignores the teachings in *Tashjian*. In *Tashjian*, the court determined that the State of Connecticut's election law prevented a political party from inviting independents to vote in its primary. Although the Court determined that the regulation could not withstand judicial scrutiny in relation to independent voters, the court made a specific point to advise that a request of a political party seeking to open its primaries to other affiliated voters would not meet with the same results. *Tashjian*, 479 U.S. at 224, n. 13. Footnote 13 states:

> "Our holding today does not establish that state regulation of primary voting qualifications may never withstand challenge by a political party or its membership. A party seeking, for example, to open its primary to all voters, including members of other parties, would raise a different combination of considerations. Under such circumstances, the effect of one party's broadening of participation would threaten other parties with the disorganization effects which the statutes in

> *Storer v. Brown*, 415 U.S. 724 (1974), and *Rosario v. Rockefeller*, 410 U.S. 752 (1973), were designed to prevent. . . ."

What the footnote in *Tashjian* teaches us is that not only are the effects on the requesting political party to be considered, but that the effects on any other voters or other political parties are also to be considered in evaluating the constitutionality of a State regulation.

In *Rosario*, the court upheld a party registration time restriction which required a voter to register or change his political affiliation prior to the November general election in order to vote in the next political party primary elections. This court upheld the party registration time restriction specifically to prevent "party raiding." Those time restrictions also protect a political party from having its members being drawn to a second political party in an attempt to alter the primary elections of the first political party. "Party raiding" was defined in *Rosario* as a scheme "whereby voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party's primary." *Rosario*, 410 U.S. at 760. In *Jones*, this court again acknowledged the possibility of and the legitimate State's interest in preventing party raiding:

> [F]inally, in order to prevent 'party raiding' – a process in which dedicated party members of one party formally switched to another party to alter the outcome of that party's primary – a state may require registration a reasonable time before a primary election.

Jones, 530 U.S. at 573, citing *Rosario v. Rockefeller*, 410 U.S. 752.

In a semi-closed primary, the individual must identify himself with the party and, therefore, the party's principles. Even if the voter disaffiliates from the party after the primary elections, he joined the party for a time and associated with that party's message. However, even *Jones* recognized, which the Court of Appeals did not, the importance of actually affiliating with the political party. *Jones*, instead of requiring open primaries, supports the idea of party registration and affiliation prior to voting in a political party's primary. *Id.* 530 U.S. at 577.

Without doubt, raiding is an issue that would effect the Libertarian Party if the primary was open to all voters. While "raiding" in the truest definition may not be the issue for the Democratic or Republican parties, in this case the inverse activity of draining voters certainly is at issue. The district court termed this potential problem of voters leaving their party's primary as "poaching," a term also used by the Tenth Circuit Court of Appeals. (Pet. App. 17.) If raiding is a legitimate concern for a State to consider and regulate, the draining of party voters should also be a legitimate State interest as it too could adversely affect a political party. Those effects include changing the primary results and possibly changing the message of the party as espoused by the party's nominee, who may not have been nominated but for the poaching of voters.

A State's interest in avoiding the possibility of unrestrained factionalism in a general election provides adequate justification for a restriction on a citizen's ability to vote. *Burdick*, 504 U.S. at 439. These types of results would cause this very problem for the political parties.

The district court properly recognized the potential problems and the State's interests in preventing such

activity to the detriment of an unwitting political party and party voter. The district court's concern was based upon the evidence presented at trial. The decision of the Tenth Circuit Court of Appeals acknowledged this interest but gave it no weight. That decision deprived the State of consideration of legitimate interests akin to those in *Rosario* and *Storer.*

The Oklahoma statute serves not only to protect against activities such as raiding but serves to protect the integrity and the viability of the other political parties from actions such as poaching. In *Jones*, the court considered the effect of California's blanket primary laws and the effect of crossover voting which may occur under an open or blanket primary. In reaching this determination, the court relied on statistics which indicated that in an open primary the number of voters crossing over from their political party to another party could approach as much as twenty-five percent (25%). *Id.* 530 U.S. at 578. The amount of crossover would effect not only the results of the primary election to which the voters had been drawn but would also adversely effect the results and nominations of the party which had been abandoned in the primary vote. Those adverse effects are the exact effects which the court in *Rosario* and *Jones* indicated the State had an interest in preventing.

At the trial in this matter, Defendants submitted an expert report prepared by their expert witness, Dr. Robert Darcy, a political science professor at Oklahoma State University. (J.A. 44-78, Def. Ex. 8.) The evidence presented to the trial court revealed that in the 2000 Oklahoma election cycle, twenty-four percent (24%) of the primary and runoff elections were decided by five percentage points. (J.A. 63-64.) In fact, the evidence showed that over

four percent (4%) of the primary and runoff races were decided by less than one percent (1%) of the votes cast. (Def. Ex. 8, J.A. 63-64.) In oral testimony before the court, Dr. Darcy reiterated those figures and provided scenarios as to how the poaching of votes by the Libertarian Party could affect the election results of the other parties (R.T. 379-83, Def. Ex. 8, J.A. 65-66.)

As the 2002 election cycle had been completed prior to the trial in this matter, Dr. Darcy had also reviewed those results. Dr. Darcy testified that upon review of the results of the 2002 election cycle, he found that a number of runoff and primary races similar to the percentages found in 2000 were also decided by less than five (5) percentage points as well as a similar number decided the slimmest margins of less than one percentage point. (R.T. 381-82.) Based on his experience, research and practice as a political scientist, Dr. Darcy had no doubt that the creation of a party option semi-open primary, as requested by the Respondents would adversely affect not only the Libertarian primary elections but also would unwittingly affect an unknown number of Republican and Democratic primary and runoff elections. (R.T. 382-83.)

It is unquestioned that crossover voting would occur. Absent a declaration by the crossover voter as to his intentions, it is impossible to know the specific reason for crossover voting. Dr. Darcy also testified that the potential reasons for the crossover voting would include purposeful conduct such as "raiding" or "swamping" or even a concerted effort by the Libertarian Party to draw voters from the other parties. Other reasons for crossover voting could be legitimate reasons such as a curiosity on the part of the crossover voter or the actual desire to vote for a particular

person or through unintentional means to avoid confusion on the part of the voter.

In his report and testimony, Dr. Darcy testified that as high as ten percent (10%) of the Democratic and Republican voters in a primary and/or primary runoff election would crossover and vote in a Libertarian primary. (R.T. 374-75.) The testimony indicated that with this minimum ten percent (10%) crossover or a potential crossover rate of up to twenty-five percent (25%) as recognized in *Jones*, the opening of one party's primary would adversely effect the other parties' primaries. Dr. Darcy testified that due to the closeness of the primary and runoff primary elections, even a small percentage of crossover votes would adversely effect the primary elections of both the Libertarian Party as well as the other parties from which the affiliated voters come. (R.T. 378-83.) Dr. Darcy testified that the effect on the votes of the primary could lead to voter confusion in the general election as, whether proper or not, voters tend to rely on party affiliations of the candidate as an indication of that person's stances on the issues. This belief is consistent with the holdings of this Court.

A State has a strong interest in the stability of its political systems. *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 226 (1989). That interest does not permit a State to completely insulate the major political parties from the influence or competition of minor parties. *Anderson*, 460 U.S. at 802. However, that interest does permit a State to enact reasonable election regulations that may favor the traditional two-party system and that may "temper the destabilizing effects of party splintering and excessive factionalism." *Timmons*, supra at 367.

The United States Constitution permits a State legislature, in this case the Oklahoma Legislature, to decide that political stability is best served through a healthy two-party system. *Id. citing Rutan v. Republican Party of Ill.*, 497 U.S. 62, 107 (1990) (Scalia, J. *dissenting*).

While the interest in securing the perceived benefits of a two-party system will not justify "unreasonably exclusionary restriction," this Court has "repeatedly upheld reasonable, politically neutral regulations." *Timmons*, supra at 367-69, *citing Williams v. Rhodes*, 393 U.S. 23, 31-32 (1968) and *Burdick v. Takushi*, 504 U.S. at 437-38.

In *Timmons*, the court addressed a challenge to Minnesota's anti-collusion rule by a Minnesota political party which argued that Minnesota's rule prevented the minor party from broadening its base of support and getting its message to the general public. The State asserted that it had an interest in avoiding voter collusion and preventing party splintering and disruption of the two-party system. The court found that these interests were legitimate State interests for which a State could reasonably regulate an interest which must be considered by the court in determining the reasonableness of the State-imposed restrictions. *Timmons*, supra at 367. As the district court found, those same interests, such as the avoidance of party splintering, exist in Oklahoma and the Oklahoma statutes are designed to help protect those interests. The district court further recognized that:

> It is clear that the "important regulatory interests," *Burdick* at 434, which may outweigh associational rights in the election law context may

> encompass matters of structure, stability and party integrity . . .

(Pet. App. at 69.)

Moreover, the Oklahoma statutes are politically neutral. The statutes do not differentiate between the Democratic and Republican parties and any other political party which might be recognized in Oklahoma, including the Libertarian Party.

In spite of the evidence presented, which the trial court found to be of sufficient interest to the State, the Tenth Circuit Court of Appeals totally discounted the effect of a semi-open primary on other political parties as no concern to the State, or other political parties or the parties' members.

The Tenth Circuit Court of Appeals, *citing Timmons*, acknowledged that a "State's interest in the stability of its political system is strong." (Pet. App. at 17.) As the court also noted, the State's interest in political stability, especially in the context of ballot access, is "not only permissible but compelling." *Citing Storer v. Brown*, 415 U.S. 724, 736. (Pet. App. at 17.) The Tenth Circuit Court of Appeals then went on to ignore those directives and determined that the State's interest in these very issues was not sufficiently compelling. (Pet. App. at 22-3.)

Anytime a party nominee is nominated by people outside the party or a nominee has been selected by a smaller number of party voters as a result of a smaller turnout due to the party's members voting in other political primaries, the possibility that a nominee who is not an adherent to the party ideas is greatly enhanced. The result would encourage party factionalism, confusion of party

identification of the candidate and adversely affect the integrity of the election process. *See Storer v. Brown*, 415 U.S. 734 (1983); *Rosario v. Rockefeller*, 410 U.S. 752 (1973).

III.

THE OKLAHOMA RESTRICTIONS ARE NOT SEVERE OR OVERLY BURDENSOME AND AS SUCH THE SEMI-CLOSED ELECTION SYSTEM MUST BE DETERMINED TO BE CONSTITUTIONAL AS THE STATUTES ARE SUPPORTED BY "IMPORTANT REGULATORY INTERESTS."

While the First Amendment protects the rights of citizens to associate for political purposes, a "state may, and inevitably must, enact reasonable regulations of parties, elections and ballots to reduce election – and campaign – related disorder." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997).

Simply because a party alleges the open primary will be of benefit to a third party does not require a State to permit that action. *Id.* 520 U.S. 361-62.

A. The Appropriate Standard Of Scrutiny Is Not A Strict Scrutiny Standard As Applied By The Court Of Appeals But A Lesser Standard.

The decision of the Court of Appeals effectively strikes the registration time restrictions that have repeatedly been upheld by the Courts basically allowing a member of the Democratic or Republican parties to effectively change his or her registration on the day of the election by simply voting in the Libertarian party primary. No other action is

necessary. There is no requirement under the Court of Appeals ruling that a Democrat or Republican voter must first resign from his party and re-affiliate or become a member of the party in order to vote in the Libertarian Party Organization primary elections. This type of primary is exactly what was stricken by the court in *Jones*.

What the court in *Jones* did recognize, is that some states conduct closed primaries but allow a voter to change his party affiliation even on the day of the election. Even though the change in registration might be easy and last minute, the voter in changing his affiliation actually becomes a member of the party in whose primary he chooses to vote. *Jones*, 530 U.S. at 577. Admittedly, a number of states do have similar primary registration rules and those rules, if a state chooses such scheme, are not unconstitutional. However, there is no constitutional requirement of same day registration and Oklahoma does not have same day registration. Oklahoma allows a voter to change his party affiliation up to June 1 of an election year, or approximately seven (7) weeks prior to the primary election. The voter cannot change his party affiliation between June 1 and August 31, which is a date after the runoff election but before the November general election. 26 O.S.A. § 4-119 (App. 9.) Oklahoma's failure to have same day registration does not trigger strict scrutiny, much less run afoul of the United States Constitution.

In *Rosario v. Rockefeller*, 410 U.S. 752, 93 S.Ct. 1245, 35 L.Ed.2d 1 (1973), the Supreme Court upheld party registration time restrictions specifically to prevent "party raiding" which was defined by the Supreme Court as a process in which dedicated members of one party switch to another political party in an attempt to alter the outcome of the second party's primary. That time restriction also

protects a political party from having its members being drawn to a second political party in an attempt to alter the primary elections of the first political party. In *Jones*, this Court cited *Rosario* with approval and failed to go so far as to overturn or even limit that decision. *Jones*, 530 U.S. at 572.

Even if a voter was required to actually affiliate with another party at the election booth on election day, such contemporaneous declaration of affiliation does not, and cannot, prevent false statements of party identification. This type of registration or affiliation does not protect any of the State's interests in preventing raiding or other electoral problems in the manner that prior registration does. *See Rosario v. Rockefeller*, 410 U.S. 752, 762, *also see Developments In The Law – Elections*, 88 Harv. L. Rev. 1111, 1173, n. 114.

Under the Oklahoma semi-closed election scheme, an affiliated voter may not vote in another party's political primary. But all he need do to vote in another party's primary is disaffiliate himself with the first party and register as a member of another political party. This may be accomplished up to seven (7) weeks prior to the primary elections, at a time after which the candidates would have made their candidacies known. 26 O.S.A. §§ 1-102, 4-119 (App. 1, 9.) This restriction is less severe and less burdensome than the restrictions challenged in *Rosario*, *Timmons*, and *Burdick*, all of which were reviewed under the lesser scrutiny standard.

B. As The Burdens Imposed By The Oklahoma Statutes Are Not Severe, The Court Of Appeals Erred In Applying A Strict Scrutiny Standard And Requiring Compelling State Interests.

The Court of Appeals erred in finding that the restrictions imposed by the Oklahoma statutes are severe. The court should have found, as the district court found, that the burdens placed on the voters by the State regulations were less than severe and that under the applicable balancing test, the regulatory interests of the State of Oklahoma were sufficient enough to justify the regulations. The Court of Appeals summarizes that in any case alleging a restriction on a party's associational rights the regulation must be narrowly tailored to advance a compelling state interest. The Court of Appeals cites to *California Democratic Party v. Jones*, 530 U.S. 567 (2000) and *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986) as a basis for applying the strict scrutiny standard. However, in *Jones*, the associational right being violated was the forced inclusion of non-party members in the voting processes of that party's primary election. In *Tashjian*, the question was the severity of a rule prohibiting non-affiliated voters from voting in a political party's primary, if that political party so chose to invite the independent voters. The severity of the burden was related directly to the fact that the political party wanted to invite non-affiliated voters, which would have no effect on any other political party.

However, the present issue is whether it is permissible and constitutionally appropriate for a state to restrict a political party from allowing a voter already affiliated with another political party from participating in another political party's primary. There are no cases finding that

such a burden on a political party or voters is a severe burden.

In this case, none of the registered Democrats or Republicans have a right to vote in another party's primary. And, the only right this Court has presumably found on behalf of a political party in seeking outside voters is the right to invite unaffiliated independent voters to vote in its primary. This Court has never held that a party has a constitutional right to invite members of another party to vote in its primaries. This Court has only concluded that it is permissible for a State to allow a political party to open its primary to other voters, but such primary election system is a matter of State choice not constitutionally mandated.

More importantly, in the cases that addressed a State's requirement that a voter be registered as a member of that political party prior to election day in order to be able to vote in that party's primary, the election laws have been reviewed under a less exacting review or what has commonly been known as a balancing test. In *Rosario v. Rockefeller*, 410 U.S. 752 (1973), this Court applied lesser scrutiny in evaluating whether a New York law that required voters to enroll in the political party by a certain cutoff date in order to vote in that party's primary violated a voter's First Amendment rights to political association. In *Rosario*, the plaintiffs challenged a New York state law which required a voter to enroll in the political party of his choice at least thirty (30) days prior to the November general election in order to be able to vote in the next subsequent party primary. The rule stated that if a voter failed to meet that deadline, the voter could not participate in a party primary until after the following general election. The petitioners filed an action alleging

that the New York statute unconstitutionally deprived them of the right to vote and abridged their freedom to associate with the political party of their choice. *Id.* at 754-56. The court first determined that the restriction was not severe and it did not constitute a ban on the voters' freedom of association due to the fact that the voters could have enrolled in the party but had chosen not to do so. The court found that the law did not absolutely disenfranchise the voters but merely imposed a time deadline on their enrollment, a deadline which they had to meet in order to participate in the next primary. In fact, *Rosario* specifically noted that under New York law "a person may, if he wishes, vote in a different party primary each year. All he need do is to enroll in the new political party between the prior primary and the October cutoff date." *Id.* at 789. For example, in June the voter could be a registered Republican and vote in the Republican primary. Before enrollment closed the following October, he could enroll in the Democratic party. Since that enrollment would be effective after the November general election and before the following February 1, he could then vote in the next Democratic primary. Before the following October, he could register to vote as a liberal, and so on. Thus, New York's scheme does not "lock" a voter into an unwanted pre-existing party affiliation from one primary to the next." *Id.*

The decision in *Rosario* is closely akin to the present action although the burden imposed on the voter under the Oklahoma system is significantly less. Under the Oklahoma primary system, a voter must generally be registered as a member of a political party, or an independent, in order to vote in that political party's primary. Oklahoma State law permits a voter to change his political affiliation as close as seven (7) weeks prior to the primary

election. As the burden on the Oklahoma voter is no more severe than that burden discussed in *Rosario*, the appropriate standard of review used by the Court of Appeals should have been an intermediate standard. Under that standard, even the Tenth Circuit Court of Appeals admitted that the burdens passed constitutional muster.

In yet another case involving a voter's ability to vote for a candidate outside his own political party's primary election, this Court applied a lesser level of scrutiny. *Burdick v. Takushi*, 504 U.S. 428 (1992). In *Burdick*, petitioner claimed that the State of Hawaii's ban on write-in voting deprived the petitioner of the ability to vote for his candidate of choice. The court first noted that not all burdens upon the right to vote are subjected to such scrutiny. *Id.* at 432. The court found that when a "state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, the state's important regulatory interests are generally sufficient to justify the restrictions." *Citing Anderson v. Celebreeze*, 460 U.S. at 788. The court determined that the Hawaii law did not prevent petitioner from voting in the elections; it simply prevented him from voting for a candidate of his choice. Such restrictions which should not prevent petitioner from voting were not held to be severe. Thus, the Court declined to apply strict scrutiny to review Hawaii's election laws.

Similar to the Hawaii statutes, the Oklahoma laws do not prevent any candidate from voting in any appropriate election. They merely require that a candidate be a member of that political party or if the political party so chooses, may be an independent voter. The burden placed on the Respondents is not severe and should not be subject to the strict scrutiny standard.

In this case, the interests set out by the State of Oklahoma should be considered compelling state interests, sufficient to sustain the current Oklahoma semi-closed primary law. In any event, the correct standard to be applied is a lesser standard and absent an application of the strict scrutiny compelling state interest standard, the State regulations are clearly constitutional as the restrictions support reasonable regulatory interests of the State of Oklahoma.

CONCLUSION

The decision of the United States Court of Appeals for the Tenth Circuit should be reversed.

Respectfully submitted,

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RELEVANT STATUTES

26 O.S. § 1-102. PRIMARY ELECTIONS

A Primary Election shall be held on the last Tuesday in July of each even-numbered year, at which time each political party recognized by the laws of Oklahoma shall nominate its candidates for the offices to be filled at the next succeeding General Election, unless otherwise provided by law. No candidate's name shall be printed upon the General Election ballot unless such candidate shall have been nominated as herein provided, unless otherwise provided by law; provided further that this provision shall not exclude the right of a nonpartisan candidate to have his or her name printed upon the General Election ballots. No county, municipality or school district shall schedule an election on any date during the twenty (20) days immediately preceding the date of any such primary election.

26 O.S. § 1-103. RUNOFF PRIMARY ELECTIONS

If at any Primary Election no candidate for the nomination for office of any political party receives a majority of all votes cast for all candidates of such party for the office, no candidate shall be nominated by such party for the office, but the two candidates receiving the highest number of votes at such election shall be placed on the official ballot as candidates for such nomination at a Runoff Primary Election to be held on the fourth Tuesday of August in the same year. No county, municipality or school district shall schedule an election on any date during the twenty (20) days immediately preceding the date of any such Runoff Primary Election.

26 O.S. § 1-104. CLOSED PRIMARIES - INDEPENDENT VOTERS

A. No registered voter shall be permitted to vote in any Primary Election or Runoff Primary Election of any political party except the political party of which his registration form shows him to be a member, except as otherwise provided by this section.

B. 1. A recognized political party may permit registered voters designated as Independents pursuant to the provisions of Section 4-112 of this title to vote in a Primary Election or Runoff Primary Election of the party.

2. The state chairman of the party shall, between November 1 and 30 of every odd-numbered year, notify the Secretary of the State Election Board as to whether or not the party intends to permit registered voters designated as Independents to vote in a Primary Election or Runoff Primary Election of the party. If the state chairman notifies the Secretary of the State Election Board of the party's intention to so permit, registered voters designated as Independents shall be permitted to vote in any Primary Election or Runoff Primary Election of the party held in the following two (2) calendar years. If the state chairman of one party notifies the Secretary of the State Election Board of the party's intent to so permit, the notification period specified in this paragraph shall be extended to December 15 for the state chairman of any other party to so notify or to change prior notification. A registered voter designated as Independent shall not be permitted to vote in a Primary Election or Runoff Primary Election of more than one party.

3. Failure to so notify the Secretary of the State Election Board shall serve to prohibit registered voters

designated as Independents from voting in a Primary Election or Runoff Primary Election of the party.

4. A group of persons seeking to form a recognized political party pursuant to the provisions of Section 1-108 of this title shall, upon filing of the petitions seeking recognition of the political party with the Secretary of the State Election Board, notify the Secretary of the State Election Board as to whether or not the party intends to permit registered voters designated as Independents to vote in a Primary Election or Runoff Primary Election of the party. If the party is recognized and the group of persons seeking recognition of the party notifies the Secretary of the State Election Board of such intention, registered voters designated as Independents shall be permitted to vote in any Primary Election or Runoff Primary Election of the party held prior to January 1 of the following even-numbered year.

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26 O.S. § 1-108. FORMATION OF NEW POLITICAL PARTIES

A group of persons may form a recognized political party at any time except during the period between June 1 and November 15 of any even-numbered year if the following procedure is observed:

1. Notice of intent to form a recognized political party must be filed in writing with the Secretary of State Election board at any time except during the period between March 1 and November15 of any even-numbered year.

2. After such notice is filed, petitions seeking recognition of a political party, in a form to be prescribed by the Secretary of the State Election Board, shall be filed with

such Secretary, bearing the signatures of registered voters equal to at least five percent (5%) of the total votes cast in the General Election either for Governor or for electors for President and Vice President. Each page of such petitions must contain the names of registered voters from a single county. Petitions may be circulated a maximum of one (1) year after notice is filed, provided that petitions shall be filed with such Secretary no later than May 1 of an even-numbered year. Such petitions shall not be circulated between May 1 and November 15 of any even-numbered year.

3. Within thirty (30) days after receipt of such petitions, the State Election Board shall determine the sufficiency of such petitions. If such Board determines there are a sufficient number of valid signatures of registered voters, the party becomes recognized under the laws of the State of Oklahoma with all rights and obligations accruing thereto.

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26 O.S. § 1-109. PARTY CEASES TO BE RECOGNIZED

A. Any recognized political party whose nominee for Governor or nominees for electors for President and Vice President fail to receive at least ten percent (10%) of the total votes cast for said offices in any General Election shall cease to be a recognized party. Said party may regain recognition only by following the procedure prescribed for formation of new political parties. The State Election Board shall proclaim the fact of a party's failure to receive a sufficient number of votes and shall order that said party cease to be recognized.

B. Any recognized political party that ceases to be recognized under provisions of this section shall be designated as a political organization. Such political organization designation shall terminate four (4) years from the date that the political party ceases to be recognized or when the political organization regains recognition as a political party, whichever is earlier.

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26 O.S. § 1-110. CHANGES IN PARTY AFFILIATION

A. The Secretary of the State Election Board shall, within sixty (60) days after such proclamation by the State Election Board, change to Independent the party affiliation in the Oklahoma Election Management System of each registered voter of a political party which ceases to be a recognized political party.

B. The Secretary of the State Election Board shall change to Independent the party affiliation in the Oklahoma Election Management System of each registered voter of a political organization which ceases to be a political organization.

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26 O.S. § 4-110.1. TIME FOR SUBMISSION OF VOTER REGISTRATION APPLICATIONS – NOTICE OF DISPOSITION

A. Voter registration applications may be submitted at any time. However, completed applications received by the State Election Board, any county election board, any agency designated to accept voter registration applications or any motor license agent as part of a driver's license or identification card application twenty-four (24) days prior

to an election; any mail application postmarked twenty-four (24) days or less prior to an election or any mail application received without a postmark nineteen (19) days or less prior to an election shall not be approved for that election if the applicant's residence is located within the geographical boundaries of the entity for which the election is being conducted.

B. No more than seven (7) days after any election, each county election board secretary for the county of the applicant's residence shall mail a notice of disposition as required in Section 8 of this act to all persons whose voter registration applications were received twenty-four (24) days or less prior to the election.

C. Registration for voting purposes occurs when a completed voter registration application is approved by the county election board secretary for the county or [sic] the applicant's residence and on the date that the information is entered into the Oklahoma Election Management System for the county of the applicant's residence.

D. Registration for candidate filing or party affiliation purposes occurs at the earliest time the completed voter registration application is received at the State Election Board, any county election board, any agency designated to accept voter registration applications or any Motor License Agent as part of a driver's license or identification card application provided that the application subsequently is approved by the secretary of the county election board for the county of the applicant's residence; or, in the case of mail applications, registration for candidate filing or party affiliation purposes shall occur at the time when the completed voter registration application is postmarked provided that the application subsequently is approved by

the secretary of the county election board for the county of the applicant's residence; or in the case of a mail application received without a postmark, registration for candidate filing or party affiliation purposes shall occur at the earliest time when the completed application is received by the State Election Board or any county election board provided that the application is subsequently approved by the secretary of the county election board for the county of the applicant's residence.

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26 O.S. § 4-112. REGISTRATION APPLICATIONS

A. The Secretary of the State Election Board shall devise and distribute a registration application to be used for registering voters. Such registration application shall contain the following information: voter's full name and date of birth, county and place of residence, and mailing address pursuant to the provisions of subsection B of this section; the names of political parties recognized by the laws of the State of Oklahoma with which the voter may be affiliated; the last four digits of the voter's social security number; an oath of the voter's eligibility to become a registered voter; and such other information as may be deemed necessary by the Secretary to identify such voter and to ascertain his or her eligibility. A voter registration application shall be signed by the applicant in writing. The applicant shall personally subscribe his or her name to or make his or her mark on the application, and no agent, representative or employee of the applicant may sign or mark on the applicant's behalf. The signature or mark must be the original, handwritten signature, autograph or mark of the applicant. No facsimile, reproduction, typewritten or other substitute signature, autograph or mark

will be valid. Notwithstanding any law to the contrary, the Secretary of the State Election Board shall prescribe procedures to authorize any person incapable of personally making a mark to complete a voter registration application with assistance of an official of any voter registration agency or motor license agency specified in Sections 4-109.2 and 4-109.3 of this title. Persons who do not indicate a recognized political party or political organization on their registration application shall be designated as Independents. Any person may apply in writing to the Secretary of the State Election Board for permission to print, copy or otherwise prepare and distribute the registration applications designed by the Secretary of the State Election Board. The Secretary may revoke any such permission at any time. All registration applications shall be distributed to the public at no charge. The Secretary also shall prescribe procedures to accept and use federal registration applications as required by the National Voter Registration Act of 1993.

B. Applicants for voter registration or for change of voter registration in any way shall provide a residence address and, if different from the residence address, a mailing address. A residence address shall include the street address of the residence, including a full house number, street name or number, apartment or suite number, if applicable, and zip code. If a street address is not available for the residence, applicants shall provide such information as the State Election Board deems necessary for voter registration purposes. A post office box may not be given as a residence address. A mailing address, which shall include the city and zip code, may be the actual emergency notification or 911 address on file in the local community, a

rural route and box number, a post office box number or a street address.

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26 O.S. § 4-119. CHANGE OF POLITICAL AFFILIATION

Any registered voter may make application under oath to change political affiliation by executing a form prescribed by the Secretary of the State Election Board at any time. The county election board secretary in the applicant's county of residence shall process and approve any such application for political affiliation change upon receipt, except as provided in Section 4-110.1 of Title 26 of the Oklahoma Statutes and except during the period from June 1 through August 31, inclusive, in any even-numbered year. The secretary shall process and approve such applications for change of political affiliation received or postmarked from June 1 through August 31 in any even-numbered year after August 31.

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(5)

No. 04-37

Supreme Court, U.S.
FILED
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In The Supreme Court of the United States

MICHAEL CLINGMAN, Secretary of the Oklahoma State Election Board; GLO HENLEY, Chairman of the Oklahoma State Election Board; KENNETH MONROE, Vice Chairman of the Oklahoma State Election Board; THOMAS E. PRINCE, Member of the Oklahoma State Election Board; and the OKLAHOMA STATE ELECTION BOARD,

Petitioners,

v.

ANDREA L. BEAVER; FLOYD TURNER; MINELLE L. BATSON; MARY Y. BURNETT; MICHAEL L. SEYMOUR; TERRY L. BEAVER; ROBERT T. MURPHY; SHARON LYNN ATHERTON; ROGER BLOXHAM; STEVE GALPIN; RICHARD P. PRAWDZIENSKI; MICHAEL A. CLEM; WHITNEY L. BOUTIN, JR.; CHRISTOPHER S. POWELL; CHARLES A. BURRIS; and the LIBERTARIAN PARTY OF OKLAHOMA, a/k/a LIBERTARIAN POLITICAL ORGANIZATION,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR RESPONDENTS

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SUMMARY OF THE ARGUMENT

The Respondents are Oklahoma voters and the Libertarian Party of Oklahoma – also known as the Libertarian Political Organization of Oklahoma (hereinafter referred to as the LPO).[1] The individual Respondents herein are registered Oklahoma voters affiliated with the Republican and Democratic parties or the LPO who wished to vote in the LPO primary election in Oklahoma on August 22, 2000, and in any future LPO primary or runoff primary elections[2]. The LPO was at the time of the

[1] The LPO is currently an unrecognized political party pursuant to Okla. Stat. tit. 26, § 1-109. During the more than four and a half years the instant case has been in litigation, the LPO has been a recognized political organization pursuant to Okla. Stat. tit. 26, § 1-109(B), a recognized political party pursuant to Okla. Stat. tit. 26, § 1-108, a recognized political organization after failing to maintain recognition pursuant to Okla. Stat. tit. 26, § 1-109(A), and a currently unrecognized political party pursuant to Okla. Stat. tit. 26, § 1-109(B). The LPO plans to regain political party recognition pursuant to Okla. Stat. tit. 26, § 1-108 for the next presidential election.

[2] The dates of the primary and runoff primary elections in Oklahoma have been changed since the decisions of the District Court and Tenth Circuit below. While the primary and runoff primary elections in Oklahoma were held on the fourth Tuesday in August and the third Tuesday of September of each even-numbered year prior to 2004, Okla. Stat. tit. 26, §§ 1-102 and 1-103 (see Resp. App.), the Oklahoma Legislature moved the primary and runoff primary elections forward approximately one month so that they now fall on the last Tuesday in July and the fourth Tuesday of August of each even-numbered year, Okla. Stat. tit. 26, §§ 1-102 and 1-103 (App.). Respondents have included in their Appendix (Resp. App.) those relevant election statutes which were in effect at the time of the District Court's decision, but which are not in effect now. Respondents have also included additional relevant statutes left out of the Appendix of the Brief of Petitioners (hereinafter "App."), viz.: Okla. Stat. tit. 26, §§ 4-103, 5-104, 5-105, and 5-110. Respondents adopt Petitioners' abbreviations set forth in footnote 1 of the Brief of Petitioners on the Merits. "Resp. App." refers to the Appendix to the Brief for Respondents.

filing of the original Complaint herein a political organization pursuant to Okla. Stat. tit. 26, § 1-109(B), but was from June 21, 2000, until shortly after the November 7, 2000, general election a recognized political party pursuant to Okla. Stat. tit. 26, § 1-108.[3]

On September 14, 2000, after the District Court turned down Respondents' request for a preliminary injunction as to the 2000 primary election, the Respondents filed an Amended Complaint (J.A. 12-23), noting that the LPO had passed by-laws and resolutions which would permit all registered Oklahoma voters to vote in any future primary or runoff primary elections conducted in Oklahoma for the LPO (Pet. App. 33). The LPO has run candidates in every presidential election year in Oklahoma from 1980 through 2000 (Pet. App. 34), and " . . . has been a fairly consistent participant in Oklahoma's primary elections." (Pet. App. 37). The LPO and its members believe that opening up the LPO's primary and runoff primary elections to all registered voters in Oklahoma would help the Party reach out to Libertarian-oriented voters of other political affiliations and produce a more viable LPO candidate for the general election. (Pet. App. 35). There are a number of Oklahoma voters who are registered in political parties other than the LPO who wish to vote in the LPO's primary and runoff primary elections (Pet. App. 35). In fact, the District Court found

[3] After the decision of the District Court below, the Oklahoma Legislature amended the ballot access laws and moved the deadline for the filing of petitions for the recognition of new political parties from May 31 to May 1 of even-numbered years. Okla. Stat. tit. 26, § 1-108. The older version in effect at the time of the District Court's decision can be found in Resp. App. herein, while the current version may be found at App. 3-4.

that it was highly likely that the ranks of registered Republican and Democratic voters in Oklahoma " . . . contained numerous voters who sympathize with the LPO but who simply do not wish to go through the motions of re-registering every time they are purged from the rolls [and] . . . will register with one of the major parties for no reason other than to avoid repeatedly being purged to unaffiliated status." (Pet. App. 48, 62).

A non-jury trial was held in the case on December 2 and 3, 2002, with the District Court ruling in a Memorandum Opinion on January 24, 2003 (Pet. App. 24-73), that the relief requested by Respondents should be denied and that Okla. Stat. tit. 26, §§ 1-104(A) and 1-104(B)(4), which ban a party-option open primary, are constitutional under the First and Fourteenth Amendments to the U.S. Constitution. In reaching its decision below, the District Court found that the instant case was not moot because the LPO was likely to have primary elections in the future in Oklahoma, there were 23 in effect open primary states in the United States, of which 3 states had party registration and allowed party-option open primaries without any evidence of confusion or harm, and the State's fears for voter confusion, raiding, swamping, and administrative difficulties were not borne out by the evidence. (Pet. App. 37-44, 61-64). However, the District Court did find that because some primary elections of the major parties in Oklahoma were decided by 5% or less of the vote, allowing some Republicans and Democrats to vote in the LPO's primary might affect the outcome of the major party primaries (Pet. App. 49, 59, 69-71).

On appeal, the Tenth Circuit reversed the decision of the District Court because the election laws in question impermissibly violated the Respondents' First Amendment

rights to political association. In reaching its decision, the Tenth Circuit considered the case in light of this Court's decisions in *California Democratic Party v. Jones*, 530 U.S. 567 (2000) and *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986). The Tenth Circuit not only used the balancing test set forth by this Court in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), but tempered its review by considering the severity of the burden placed on Respondents' rights by the election laws in question as dictated by this Court in *Burdick v. Takushi*, 504 U.S. 428 (1992) and *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997). *Beaver v. Clingman*, 363 F.3d 1048, 120 A.L.R. 5th 707 (10th Cir. 2004); (Pet. App. 1-23).

Petitioners contend that the ruling of the Tenth Circuit " . . . eliminated a State's right to require party registration prior to a primary election." (Pet. Brief 8) and that a state " . . . may not, to any extent, mandate the manner in which the party chooses its candidates within the framework of a state-sponsored and regulated election." Petitioners use "strawman" arguments and misstate the holding of the Tenth Circuit because the decision applied only to the particular facts of Oklahoma primary election law as it impacted the LPO in the record that was presented to the District Court. In actuality, the decision was not a broad-based decision, but rather found that the case presented an issue the possibility of which had first been raised in footnote 13 in *Tashjian*, and that the case at bar involved issues which lay at the intersection of this Court's decisions in *Jones* and *Tashjian*. (Pet. App. 2, 14).

Finally, the Petitioners characterize the Tenth Circuit as incorrectly applying a " . . . strict standard of review against the State's interest which preordained the unconstitutionality of Oklahoma's and many other States'

election laws." (Pet. Brief 8). Once again, the Petitioners are incorrect. The Tenth Circuit started out with the balancing test used by this Court in *Anderson v. Celebrezze* and cautiously proceeded, taking into consideration this Court's comments in footnote 13 of *Tashjian* (Pet. App. 1-11, 19-23). The Tenth Circuit simply found that the State of Oklahoma had failed to demonstrate on the record presented to the Court that a party-option open primary would cause political instability.

It is paternalistic for Oklahoma to assume that allowing Republicans and Democrats to choose to accept an invitation to vote in the LPO primary would adversely affect the Republican and Democratic parties' primary choices. As this Court said in *Tashjian*, the

> direst predictions about destruction of the integrity of the election process and decay of responsible party government are not borne out by the experience of the 29 States which have chosen to permit more substantial openness in their primary systems than Connecticut has permitted heretofore. *Tashjian*, 479 U.S. at 223, n. 12.

The evidence in the trial below overwhelmingly showed that anywhere from 69 to 75 percent of the Democrats and Republicans in Oklahoma failed to vote in their parties' primary elections (R.T. 126-127, 226). Those percentages dwarf the likely one percent or less of combined Republicans, Democrats, and Independents who might choose to vote in a future LPO primary (Pet. App. 40; R.T. 116-118, 322-323; Def. Ex. 8, J.A. 25)[4]. Any possible effects on the

[4] The only Libertarian primary to ever exceed one percent of the total vote in an open primary election was the 2.2 percent received by

(Continued on following page)

nominees of the Democratic and Republican parties in Oklahoma are certainly much more likely to be the result of the huge number of Republicans and Democrats who choose to do something other than vote in their party's primary than to be caused by the small number of Republicans and Democrats who might vote in the LPO primary.

Moreover, any Republicans or Democrats who might vote in the LPO primary would not necessarily come from ones who might otherwise have voted in the Republican or Democratic primaries, but would more probably come from those Republicans and Democrats who would not vote in their party's primary anyway along with Libertarians who were registered as Republicans and Democrats but couldn't change their registration to Libertarian in time because of the workings of Oklahoma election laws. Okla. Stat. tit. 26, §§ 1-109, 1-110, 4-112, and 4-119. While the effect of the vast majority of Republicans and Democrats not voting in their party's primary in Oklahoma is huge, the State does not choose to advance the interests of "political stability" and "integrity of the parties" by denying Republicans and Democrats the free choice to decline their parties' primary invitations. So, too, the State should not deny any Republicans and Democrats (whether or not they would have voted in their party's primary election) the opportunity to vote in the LPO primary if an invitation is extended.

It is the decision of each political party as to whether or not it wants to open up or not its political party primary unless there is a compelling state interest to the contrary.

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the Libertarian candidate for governor in Wisconsin in 2002 (R.T. 117-118).

In *Jones* this Court held that a state could not order political parties to accept a blanket primary which forced political parties against their will to allow all voters – regardless of party registration – to vote in its primary. At issue in *Jones* was the constitutional right of the various political parties to freedom of political association – a right which, by its very nature, is a matter of choice. The nature of that right necessarily implies that the political parties are not limited to choosing to exclude some voters from the process, but are free to decide on their own to permit open participation in their primary elections as well.

The issue in *Jones* (as well as this case) is one of choice, not one of absolute rules as to what kind of primary can be conducted. Here, the Respondents favor freedom of choice for political parties and individual voters on voting in political parties' primary elections, while the Petitioners are anti-choice as to letting a political party decide whether it wishes to open up its primary to all Oklahoma registered voters and then letting individual voters make their own choice. Therefore, under the particular facts and laws in the case at bar the Supreme Court should affirm the judgment of the Tenth Circuit.

ARGUMENT

I. OKLAHOMA'S SEMI-CLOSED PRIMARY ELECTION LAW TO THE EXTENT IT FORBIDS A PARTY-OPTION OPEN PRIMARY IS UNCONSTITUTIONAL UNDER THE FACTS AND CIRCUMSTANCES PRESENTED TO THE DISTRICT COURT BELOW.

A. The "Integrity" Of The Electoral Process Is Not Threatened When Voters Choose Not To Vote In Their Parties' Primaries.

In determining exactly what the state's interest is in maintaining the integrity of the political process, it is important to look for guidance to past decisions of this Court. In *Storer v. Brown*, 415 U.S. 724 (1974), this Court stated that the state's strong interest in maintaining the integrity of the political process involved prevention of inter-party raiding, assuring that the winner is the choice of the majority, or at least a strong plurality, of those voting, protection of the political process from frivolous or fraudulent candidates, and confining each voter to one vote in one primary election. *Id.* at 731-733, 741.

If the purpose of the State is to protect the integrity of the Republican and Democratic primaries so that the selection of party nominees represents the choice of the party, that purpose is served by making sure that those Republicans and Democrats who vote in the party primary choose the party candidate, not by ensuring that party members who don't vote in the party primary have a say in the selection of the party's nominee. Otherwise, the State would need to require all party members to vote in their party's primary election in order to protect the integrity of the party. The integrity of the party and election process is protected by preserving the choice of the

"voting members" of the party, not the choice of all the registered party voters and non-voters (whatever that might be).

The integrity of a political party's primary in Oklahoma is no more threatened by a party-option open primary for another political party than it is by the failure of party members to participate in the party's primary for other reasons. The vast majority of Republicans and Democrats at any given election do not vote in their party's primary. There has never been a political party primary in Oklahoma since World War II where a majority of Republicans and Democrats have voted. In 2000, 75 percent of the registered Republicans and 69 percent of the registered Democrats who had an opportunity to vote in their party's primary election did not do so (R.T. 126-127, 226). Nonetheless, integrity of the parties' political primaries is maintained because those Republicans and those Democrats who do choose to vote in their party's primary always choose the party's nominee. The vast majority of Republicans and Democrats who in any given primary election do not vote in their party's primary election never are responsible for choosing their political party's nominee.

The District Court's decision noted the State asserted that it had an interest in "protecting the integrity of the election process" and that that protection includes, "preserving the political parties as viable and identifiable interest groups, insuring that the results of primary elections . . . accurately reflect the voting of the party members. . . . " (Pet. App. 55-56; Pet. Brief 11-12). A party-option open primary would only threaten that interest if Oklahoma were somehow attempting to guarantee that all registered party members voted in the party's primary.

Since Oklahoma law permits political party members to not vote in their political party primary, allowing another party to have a party-option open primary poses no threat to the integrity of the system. After all, Oklahoma is obviously not worried about the significantly large majority of Republicans and Democrats who never on any given occasion vote in their party's primary election.

B. Voters Registered With One Political Party Publicly Selecting Another Political Party's Primary Ballot Do Commit An Act Of Political Association Because It Is More Meaningful To Select Another Party's Primary Ballot Than To Be A Non-Voter In A Voter's Own Political Party Primary.

The dissent in *Tashjian* said that it did not think there could be much of an association made with a political party by a member of another party choosing the primary ballot of that political party. *Tashjian*, 479 U.S. at 235 (Scalia, J., dissenting)[5]. The question might well be asked as to how much of a significant association a political party member has if he or she totally fails to vote in their political party's primary election. Certainly, the political association of a Republican or Democrat choosing the LPO primary ballot is much more significant than the Republican or Democrat who fails to vote in the primary election at all – particularly if the Libertarian-oriented

[5] As to political association, see *California Democratic Party v. Jones*, 530 U.S. at 577, n. 8, and *Democratic Party of the United States v. Wisconsin, ex rel. LaFollette*, 450 U.S. 107, at 130, n. 2 (1981) (Powell, J., dissenting), on the difference between voting in a blanket primary and choosing a party's primary ballot in an open primary.

Republicans and Democrats did not have the opportunity to change their registration in time to be Libertarians.[6]

Because there is no political party voter registration in Texas[7], registered voters may choose the primary ballot of any political party as long as they stick with that political party's ballot for that election year. It is hard to imagine how one could claim that it would be an insignificant political association if President Bush, his father (the former President), and the entire Republican Congressional delegation from Texas chose to vote in the 2006 Texas Democratic primary. After all, political party registration may mean no more than mere political inertia on the part of the voter, family tradition, a legally limited choice (e.g., Okla. Stat. tit. 26, §§ 1-109, 1-110, 4-112, and 4-119), community political leanings, or a decision made in

[6] Petitioners' reference in their Brief to the Respondent Floyd Turner, a Democratic Oklahoma voter who wished to vote in the LPO primary but did not wish to disaffiliate from the Democratic party, is not indicative of all the non-Libertarian Respondents. He was simply designated as an individual voter witness to avoid cumulative witnesses. Petitioners' assertion in their Brief is incorrect wherein they state that " . . . nothing would have prevented Mr. Turner from voting for [his] candidate at the general election." (Pet. Brief 15). Mr. Turner might not have been able to vote for his candidate because his candidate might have lost the LPO primary. Further, the assertion that Mr. Turner or any Respondent could have registered as Libertarian is, as demonstrated below, incorrect by virtue of the operation of Okla. Stat. tit. 26, §§ 1-109, 1-110, 4-112, and 4-119.

[7] Texas is one of 21 states which does not have registration by political party. Utah in 1999 was the last state to begin allowing political party registration (R.T. 107-108). For a full listing of open primary, closed primary, semi-closed primary, and partisan and non-partisan blanket primary states see Gary D. Allison, Protecting Party Purity in the Selection of Nominees for Public Office: The Supremes Strike Down California's Blanket Primaries and Endanger the Open Primaries of Many States, 36 Tulsa L.J. 59, 63-64, n. 32-37 (2000).

order to obtain employment. Political party registration does not always fully express one's political beliefs or loyalties. One might well ask what political party registration meant as a significant political association in the last presidential election as to Democratic Senator Zell Miller of Georgia or Republican Senator Lincoln Chafee of Rhode Island.

C. Oklahoma Has Severely Restricted Voters' Political Party Registration Choices So As To Create A Severe Burden On The LPO And Restrict Political Choice And Association.

The dissent in *Tashjian* argued that there was no question of restricting the Republican party's ability to recruit and enroll Republican members by offering them the ability to select the Republican candidates because the Connecticut election law in question permitted " . . . an independent voter to join the Party as late as the day before the primary." *Tashjian*, 479 U.S. at 235. (Scalia, J., dissenting). However, there is a significant difference in the time allowed and the deadline set in which an individual can register with the LPO or other newly recognized political parties in Oklahoma as compared to the situation in the Connecticut of *Tashjian*. In comparison to the situation in *Tashjian* where a voter could change party registration the day before the primary election – or even the day of the primary election as in Iowa and Wyoming (R.T. 108, 115-116, 231), the various states filing the Amici Curiae brief in this case contend that in Oklahoma in order to " . . . vote in another party's primary, an Oklahoma voter need only fill out a single form and file it with her local election board secretary approximately three weeks before the primary election. See Okla. Stat. tit. 26,

§ 4-110.1 (2004)." Amici brief at 9.[8] While the difference between one day before a primary and approximately three weeks is of some significance, the brief of the Amici simply fails to properly represent to the Court what Okla. Stat. tit. 26, § 4-110.1 stands for.[9]

In fact, Okla. Stat. tit. 26, § 4-110.1 allows an Oklahoma resident who is not already a registered voter to register for a primary election no later than 24 days prior to a primary or other election. The error made in the Amici brief in representing to the Court that approximately three weeks before a primary election an Oklahoma voter could change party affiliation in order to vote in the Libertarian or some other party's primary is the result of failing to take into consideration Okla. Stat. tit. 26, § 4-119 which forbids, under the old version in effect at the time of trial of the case at bar (Resp. App. 3-4), any registered Oklahoma voters from changing their political party affiliation after July 1 at 5:00 p.m. during the months of

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[8] Two of the Amici Curiae states have election laws which should be considered: New Hampshire has a semi-closed primary system which allows an exception for an open primary for newly recognized political parties. N.H. Rev. Stat. Ann. § 659.14(I); while Utah allows for a party-option open primary. Utah Code Ann. §§ 20A-9-403 (2)(a). In the record it was noted that Utah had probably the weakest Democratic party in the country and that the Democratic party in Utah had conducted an open primary in 2002 without Utah having problems with instability. (R.T. 121-123, 133, 185; J.A. 79-80). It may be that the reason for heavily Republican Utah to participate in the Amici Curiae Brief is that the Republican dominated Legislature would like to repeal the party-option open primary for the purpose of maintaining the status quo prior to the Democratic party deciding upon an open primary.

[9] The District Court in its Memorandum Opinion made a similar mistake when it indicated that a voter who wanted to try LPO "politics may change his registered party affiliation only a few weeks before the primary election." (Pet. App. 70).

July, August, and September (or under the new law which went into effect April 1, 2004 (App. 9), of changing party affiliation after May 31 during the months of June, July, and August of any even-numbered year). Therefore, the correct interpretation of Okla. Stat. tit. 26, §§ 4-110.1 and 4-119, when read together, shows that only a previously unregistered voter may register within 24 days of a primary election, while all other registered voters are absolutely prohibited from changing their political affiliation from Republican, Democrat, or Independent to Libertarian or any other new political party affiliation for a period of over eight weeks before the primary election.[10]

D. Oklahoma Makes It Virtually Impossible For Republican, Democratic, And Independent Voters To Change Their Political Affiliation To A Newly Recognized Political Party Unless The Registered Voters Wish To Become A Candidate Of The New Political Party.

The difference between the day before or the day of the primary election for voters to change their political affiliation and a period of time of over eight weeks before a primary election is quite significant considering: "Until a

[10] Petitioners contend that Oklahoma allows a voter to change his party affiliation "approximately seven weeks prior to the primary election." (Pet. Brief 28). Actually, the period of time is closer to eight and a half weeks. In 2008, the primary election is on July 29, 2008, a period of time 59 days after the last day to change party affiliation on May 31, 2008. Okla. Stat. tit. 26, § 4-119. As is demonstrated hereafter, there are problems in changing political affiliation before May 31 of an even-numbered year if the voter desires to change registration into a newly recognized political party.

few weeks or even days before an election, many voters pay little attention to campaigns and even less to the details of party politics." *Jones*, 530 U.S. at 586 (Kennedy, J., concurring). Eight weeks before and until the primary election, and even before the filing period for candidates, Oklahoma law prevents registered Republicans, Democrats, and Independents from changing their political affiliation in order to vote in another political party's primary, pursuant to Okla. Stat. tit. 26, § 4-119 – which presumably exists to prevent "party raiding." Also, the six-month party or Independent affiliation rule for candidates, pursuant to Okla. Stat. tit. 26, § 5-105, presumably exists to prevent sore losers from running under a different political affiliation.

The lone exception to Oklahoma's voter registration and political affiliation change rules is if the Republican, Democratic, or Independent registered voter in Oklahoma wishes to be a new party candidate for office, in which case the potential candidates have 15 days from the date the new party is recognized to change their registration over as members of the new political party, Okla. Stat. tit. 26, § 5-105(A), even though that person could not vote in the primary election unless he chose to be a newly recognized party candidate. Therefore, while the candidate wishing to change parties has 15 days after party recognition, a Republican or Democrat wishing to change registration to vote in the newly recognized party primary would have to do so well before candidates for any parties make their intention known by declaring their candidacy, pursuant to Okla. Stat. tit. 26, § 5-110, on the first Monday through Wednesday of June of an election year.

The statute permitting candidates for newly recognized parties 15 days to register with the new party is an

exception to Oklahoma's general rule that a candidate must be affiliated with a party for six months before he or she can run for office from that party. Okla. Stat. tit. 26, § 5-105. Before the creation of this exception, the Oklahoma Legislature had not even considered the problem of newly recognized party candidates who could not register as members of the party prior to party recognition. Thus, in 1980, when the LPO first achieved party recognition in Oklahoma, Libertarian candidates for State office were removed from the ballot because it was impossible for them to have been registered with the party for six months. LPO candidates had to seek relief in Court in order to obtain ballot status. *Crussel v. Oklahoma State Election Bd.*, 497 F.Supp. 646 (W.D. Okla. 1980). It was only after the *Crussel* case that the Oklahoma Legislature dealt with the problem it had created by failing to consider the impact of Oklahoma's ballot access, durational political affiliation, and voter registration laws on newly recognized political parties. Prior to the change in Okla. Stat. tit. 26, § 5-105(A), it was simply impossible for a candidate of a newly recognized political party to have been registered with the party for the six months required by the political affiliation rule.

Although Oklahoma has now resolved that problem, the Oklahoma Legislature has still not addressed the problem presented by the workings of Okla. Stat. tit. 26, §§ 1-109, 1-110, 4-112, and 4-119, which make it nearly impossible for voters other than either new voters or candidates of new parties to change their political affiliation voter registration in order to vote in a newly recognized party's primary and primary runoff elections.

If the foregoing voter registration restrictions and limitations on the change of political affiliation make the

LPO's problem in the case at bar considerably more difficult than was the case for the Republican Party of Connecticut in *Tashjian*, the effect of Okla. Stat. tit. 26, § 1-108 as said law impacts the foregoing statutes is an even greater problem. Section 1-108 of the Oklahoma Election Laws for the formation of new political parties currently allows a new political party to turn in a petition containing the names of registered voters wishing to form a new political party totaling 5 percent of the total vote cast in the latest general election either for Governor or President. The deadline for filing such a petition, under current law, is May 1 of an even-numbered year (or May 31 under the old law in effect at the trial of the instant case). The State Election Board is allowed 30 days after the receipt of the petition to determine if there are sufficient signatures to recognize the new political party.

The problem resulting from Okla. Stat. tit. 26, § 1-108 can be demonstrated by imagining the LPO turning in a new petition for political party recognition on May 1, 2008 – the next election in which the President will be chosen. If the State were to take the 30 days allowed to determine the sufficiency of the petition, then it would not be until May 31, 2008, before the LPO would know if it had been recognized as a political party under Oklahoma law. However, Republican, Democratic, and Independent voters in Oklahoma who might wish to register with the LPO after May 31, 2008, would find that they were absolutely prohibited under the election registration laws from changing their party affiliation during the months of June, July, and August. Okla. Stat. tit. 26, § 4-119. Therefore, the only way Republican and Democratic registered voters would be allowed to vote in the LPO primary would be if they also wanted to be Libertarian candidates for office, in

which case they would have 15 days, until June 15, 2008, to change their political party registration.[11]

Of course, the new political party seeking recognition in Oklahoma could try to turn its recognition petitions in significantly before the deadline, but that would further increase the severe burden of Oklahoma's ballot access law (R.T. 229) by requiring the collection of petition signatures even further from the political election season, when political interest is less and the weather is worse. Early petition filing deadlines and bad weather have been recognized by courts as severely impacting ballot access laws, especially severely restrictive ones such as Oklahoma's. *Anderson v. Celebrezze*, 460 U.S. at 792; and *Libertarian Party of Oklahoma v. Oklahoma State Election Bd.*, 593 F.Supp. 118, 121 (W.D. Okla. 1984).[12]

[11] On the other hand, the above scenario under the law in effect at the time of the non-jury trial in this case would be somewhat different, i.e., the deadline for filing the party petition would have been on May 31, when the LPO did file it; the deadline for the State Election Board to determine the sufficiency of the signatures would have been on June 30, and the months in which registered voters could not change their political affiliation unless they wanted to be candidates of the LPO would have been from July 1 at 5:00 p.m. until September 30. Other than making the ballot access laws of Oklahoma more restrictive by a 30 day earlier deadline, the foregoing date changes do not affect materially the instant issues.

[12] It is possible for the State Election Board to take less than the 30 days allowed by law to certify the petition signatures – as was done on June 21, 2000, which afforded nine days for voters who might have learned of the LPO recognition to change their political affiliation (Pet. App. 31). However, there is no guarantee in the future that the State Election Board will be able to complete the certification of the petition signatures in less than the 30 days allowed by Okla. Stat. tit. 26, § 1-108.

In short, Oklahoma makes it virtually impossible for registered Republicans, Democrats, and Independent voters to change their political affiliation to a newly recognized political party in time to vote in its primary election. The particular facts and circumstances of this case are therefore clearly distinguishable from the election laws considered by this Court in *Tashjian* and the considerably more liberal registration laws of the overwhelming majority of states (R.T. 84, 86).

E. Oklahoma Voter Registration Laws, Unlike Those Of Most Other States, Place Severe Restrictions On Registration In Non-Recognized Political Parties As Well As Severely Restricting Voter Registration In A New Political Party After It Has Been Recognized In Oklahoma.

It might be argued the foregoing problems suggested for the primary election of 2008 for the LPO, or any new political party, did not apply to the LPO in the election of 2000 because its voters could have registered as a member of the Libertarian Political Organization in Oklahoma. Unfortunately, Oklahoma Election Law also fails the political organization which becomes a political party through a successful petition pursuant to Okla. Stat. tit. 26, § 1-108. People who register in Oklahoma as members of the Libertarian Political Organization or any other political organization are, in effect, second class registered voters. Unlike individuals who are registered as Republicans, Democrats, or Independents, individual registered voters who have registered as members of the LPO while it is designated under state law as a political organization cannot vote in any primary election and are the only class

of registered voters who are absolutely prohibited from running as candidates for partisan political office. Okla. Stat. tit. 26, §§ 4-112, 4-119, 5-104, and 5-105 (R.T. 56).

For purposes of political party registration, Oklahoma law distinguishes between Republicans, Democrats, and Independents, members of political organizations (e.g., the Libertarian and Reform), and individuals who identify themselves with non-recognized political parties. Individuals who are registered as Republicans and Democrats (i.e., recognized political parties) may file as candidates of their political parties for office and vote in their primaries. Individuals who are registered as Independent voters may run for office under the relatively easy ballot access provided in Oklahoma for Independent candidates. By contrast, individuals who identify themselves with non-recognized political parties may not register in Oklahoma as members of those political parties, but must choose to register themselves as either Republicans or Democrats or Independents. Okla. Stat. tit. 26, § 4-112. However, during those periods of time when political organizations are recognized in Oklahoma (i.e., four years after a political party has been decertified in Oklahoma and not been re-recognized as a political party) members who wish to identify themselves with a political organization are free to register as a political organization registered voter. Okla. Stat. tit. 26, § 4-112.[13]

[13] From 1999 to June of 2000, and from late 2000 to late 2004, there were two political organizations in Oklahoma (viz.: Libertarian and Reform).

The disadvantage that registered members of political organizations suffer in Oklahoma is that they are absolutely barred from running for political office as either an Independent, Okla. Stat. tit. 26, § 5-105(B), or a member of the political organization, or the Republican or Democratic parties. Okla. Stat. tit. 26, §§ 5-104 and 5-105(A). Therefore, by choosing to register as a member of a political organization, an Oklahoma voter will not be able to vote in any primaries or run for political office under any political label. As a result, many individuals who identify themselves with a political organization will register as Republicans, Democrats, or Independents in order to be able to run as a candidate for office when their political organization is not a recognized political party, or simply to avoid having to continually re-register after their political party or political organization has been decertified pursuant to Okla. Stat. tit. 26, § 1-109. As the District Court stated:

> As a factual matter, as has been discussed, the court is in a very poor position to assay the purity of the Libertarian voting electorate because the Libertarian Registration rolls are periodically purged, with the result that, to an inherently unmeasurable extent, voters who have Libertarian political inclinations will either come to rest on the roll of unaffiliated voters or will register with one of the major parties for no reason other than to avoid repeatedly being purged to unaffiliated status. (Pet. App. 62).

Moreover, even a voter who is willing to face the disadvantages of being listed as a member of a political organization runs up against yet another obstacle when the organization gains or regains political party status. At this point, Okla. Stat. tit. 26, §§ 1-109(B) and 1-110(B) require the decertification of the political organization and

the re-registering of all its voters to Independent status. Thus, Oklahoma election law punishes the political organization for becoming a recognized political party by changing the registered voters of the political organization to Independent upon the successful recognition of the political party pursuant to Okla. Stat. tit. 26, § 1-108. In *Rosario v. Rockefeller,* 410 U.S. 752 (1973), and *Storer v. Brown*, at least the voters had a chance to change their registration in advance and stay with their chosen political party.

There can be no question but that the impact of all these restrictions on the associational rights of the LPO is severe. After all, it is the State of Oklahoma which forces the LPO, in order to obtain ballot access, to meet what can only be characterized as one of the most restrictive ballot access laws in the country. Okla. Stat. tit. 26, §1-108 (R.T. 229). Further, Oklahoma has a very restrictive retention law which serves to remove the LPO from the Oklahoma ballot at the end of every Presidential election. Okla. Stat. tit. 26, §1-109. Finally, it is the State of Oklahoma which forces the LPO to choose its party nominees through a political party primary system. Okla. Stat. tit. 26, §1-102; Okla. Const. art. 3, §3. These features of Oklahoma law, combined with the restrictions the law places on voters' ability to register as LPO members once the LPO surmounts the obstacles to obtaining party status, together prove that if LPO primaries are limited to registered LPO members and Independents, very few of the voters who would like to participate will be able to do so.

In contrast to Oklahoma, California allows minor party voters some constancy as to voter registration. One of the differences between the LPO and the California Libertarian Party is the freer, more open access to voter

registration in California. In California, not only is ballot access and ballot retention for minor political parties easier (R.T. 89-99; J.A. 30-36, 41-43, 80-83), but voters may register as members of any political party. Thus, the Libertarian Party of California is relatively large – about 30 times larger than the LPO if registration is adjusted for population (R.T. 95-96). On the other hand, since Libertarians are rarely allowed to register as Libertarians in Oklahoma and there are other restrictions on changing registration, a large number of Libertarians are either registered as Independents or as Republicans and Democrats (Pet. App. 48, 62).

Therefore, while the California Libertarian Party might wish to exclude Independents and members of other parties from voting in its party primary because there has been ample opportunity for voters to register as Libertarians, in Oklahoma the LPO wishes to invite Independents and Republicans and Democrats to vote in its primary election because many of those Independent, Republican, and Democratic voters have not had an opportunity – as they have in California – to register as Libertarians. Further proof of the effects of Oklahoma's laws on the creation and maintenance of a Libertarian voting pool can be found in the evidence presented at the trial below regarding Libertarian voter registration in other states. While Oklahoma on June 30, 2000, had a total of 360 registered Libertarians, Kansas, a somewhat smaller state, had 9,976 registered Libertarians, California in October of 2002 had 89,736, and Arizona, a state slightly larger than Oklahoma, had approximately 14,000 registered Libertarians (Pl. Ex. 3, J.A. 35-36; Def.'s Ex. 9, J.A. 81; and R.T. 155). Because minor parties in Oklahoma do not enjoy stability of legal recognition they have small

memberships (J.A. 35; R.T. 89, 91, 93, 95-99). Under more liberal registration laws voter registration in the LPO would likely be in excess of 12,000, based on a comparison with other states.[14]

II. OKLAHOMA DID NOT PRESENT IN THE TRIAL BELOW ANY LEGITIMATE STATE INTEREST WHICH MAKES IT NECESSARY TO BAN A PARTY-OPTION OPEN PRIMARY.

A. A Correct Reading Of Footnote 13 In This Court's Decision In *Tashjian* Calls For An Analysis Of The Particular Facts Involved In Each Case And Not The Adoption Of A Rigid Rule Allowing Or Disallowing A Party-Option Open Primary.

In many ways, this case has been an extended argument over the meaning, interpretation, and application of footnote 13 in the *Tashjian* case, 479 U.S. at 224, n. 13. While the Petitioners and the Amici in the case at bar seem to think that footnote 13 in *Tashjian* allows the State, in the pursuit of political stability, to forbid political parties from opening up their primaries, and that the holding of the Tenth Circuit in *Beaver* would allow political parties at their whim to open their primaries to all registered voters. But footnote 13 has been properly interpreted and applied by both the Tenth Circuit in *Beaver* and the First Circuit in *Cool Moose Party v. State of Rhode Island*,

[14] Oregon, with a population close to Oklahoma's, has 16,236 registered Libertarians. Richard Winger, 2004 October Registration Totals, 20 Ballot Access News, No. 8, p. 3 (Dec. 1, 2004), www.ballot-access.org.

183 F.3d 80 (1st Cir. 1999) in a cautionary and conservative manner. In order to properly understand *Tashjian's* footnote 13, it is important to consider the entire footnote and not just the first half of it as given the Court in the Brief of Petitioners.[15] As the Court said:

> Our holding today does not establish that state regulation of primary voting qualifications may never withstand challenge by a political party or its membership. A party seeking, for example, to open its primary to all voters, including members of other parties, would raise a different combination of considerations. Under such circumstances, the effect of one party's broadening of participation would threaten other parties with the disorganization effects which the statutes in *Storer v. Brown*, 415 U.S. 724 (1974), and *Rosario v. Rockefeller*, 410 U.S. 752 (1973), were designed to prevent. We have observed on several occasions that a State may adopt a "policy of confining each voter to a single nominating act," a policy decision which is not involved in the present case. See *Anderson v. Celebrezze*, 460 U.S. 780, 802, n. 29 (1983); *Storer v. Brown*, supra, at 743. The analysis of these situations derives much from the particular facts involved. "The results of this evaluation will not be automatic; as we have recognized, there is 'no substitute for the hard judgments that must be made.'" *Anderson v. Celebrezze, supra*, at 789-790 (quoting *Storer v. Brown, supra*, at 730). *Tashjian*, 479 U.S. at 224, n. 13.

[15] Both the District Court and Tenth Circuit in *Beaver v. Clingman*, as well as the First Circuit in *Cool Moose*, also only restated the first half of footnote 13 from *Tashjian*.

First, this Court should consider the reference in the second sentence of footnote 13 to "a different combination of considerations." The case at bar should not be considered in general and broad terms as the Petitioners and Amici would have this Court do, but rather in the context of the minor party involved (the LPO), the particular ballot access, ballot retention, and voter registration laws of Oklahoma as they impact the LPO, and the proof presented at trial by the State to try to justify its ban on a party-option open primary. This case does not present the false dilemma of either party-option open primary only or state prohibition of a party-option open primary only. Respondents would submit to the Court that the "different combination of considerations" to be analyzed are that the LPO has not had continuous existence under the election laws of Oklahoma, has had to try to meet ballot access laws which are among the most restrictive in the nation (R.T. 229), is faced when it does achieve ballot status in Oklahoma with losing political party status after each presidential election, has a limited time in which voters may register as Libertarians – particularly after the party has been recognized, an almost immediate ban on changes in political affiliation for the next three months covering the candidate filing period, party primary, and runoff primary elections, the proof at the trial that it was very unlikely that any primary elections of the major parties would actually be changed (R.T. 120-121, 191-192, 217-220, 224-226), and that it was paternalistic of the State to even believe that keeping the Libertarian primary closed would be in the best interest of the major political parties because their candidates would still be chosen by the free choice of those individuals who were registered with the major political parties and actually chose to vote in their party primaries.

The next factor to consider in analyzing footnote 13 in *Tashjian*, is the comment in the third sentence of the footnote that a party opening up its primary to voters registered with other political parties would threaten the other parties with the disorganization effects which the statutes in *Storer v. Brown* and *Rosario v. Rockefeller* were designed to prevent. However, the question arises as to what were the "disorganization effects" which the aforesaid statutes were designed to prevent. Certainly, those effects were not the same as would result in a few registered voters of major parties accepting an invitation to vote in a minor party's primary. After all, *Storer* and *Rosario* were cases involving election statutes which sought to protect political parties from the "disorganization effects" that could have resulted from sore losers and unsuccessful party candidates who then sought to run as Independent candidates, and from cross-over voters who sought to vote in a political party's primary, against the political party's rules, for the purpose of raiding and picking a weak candidate for the political party of which the cross-over voters were not members.

Rosario, and also this Court's summary affirmation in *Nader v. Schaffer*, 417 F.Supp. 837 (D. Conn. 1976), *summarily aff'd.*, 429 U.S. 989 (1976), involved nonmembers of political parties who had sought to participate in another party's affairs against the will of that party. Therefore, this Court found that the nonmembers' desire to participate was "overborne by the countervailing and legitimate right of the party to determine its own membership qualifications." *Tashjian*, 479 U.S. at 216, n. 6. As this Court said in *Tashjian*:

> It is this element of potential interference with the rights of the Party's members which

> distinguishes the present case from others in which we have considered claims by nonmembers of a party seeking to vote in that party's primary despite the party's opposition. . . . These situations are analytically distant from the present case, in which the Party and its members seek to provide enhanced opportunities for participation by willing nonmembers. Under these circumstances, there is no conflict between the associational interests of members and nonmembers. See generally Note, Primary Elections and the Collective Right of Freedom of Association, 94 Yale L.J., 117 (1984). *Tashjian*, 479 U.S. at 216, n. 6.

Thus, the disorganization effects considered in footnote 13 are not the same as the alleged problems of the LPO "draining" voters out of the major parties' primaries in Oklahoma.[16]

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[16] "Draining" is referred to by the Petitioners as the inverse activity of "raiding" (Pet. Brief 21). In *California Democratic Party v. Jones*, this Court noted the skepticism over whether raiding ever exists in reality. *Id.* at 579; see also, *LaFollette*, 450 U.S. at 122, n. 23. The concept of draining as a concerted effort seems even more far-fetched and bizarre as a concern of the State interest to preserve political stability and the integrity of the political process. Rather, it seems an effort by the State paternalistically to try to protect the two major parties from losing voters who would not be in the mainstream of their political parties anyway. Losing Republicans or Democrats who would rather vote Libertarian would hardly cause the Republican and Democratic nominees to be "a nominee who is not an adherent to the party ideas. . . . " (Pet. Brief 26). The foregoing, of course, overlooks the fact that the idea as testified to by Dr. Darcy that perhaps 10 percent of the Republicans and Democrats would vote in the Libertarian primary in Oklahoma is absurd. As the record clearly demonstrated, in 40 out of 41 open primaries in the country, the Libertarian party received one percent or less of the total number of all voters who voted in all primaries (Pet. App. 40; R.T. 117-118, 224-226). With the LPO unable to

(Continued on following page)

In considering the above interpretation of footnote 13, Judge Berdon of Connecticut commented on the meaning of footnote 13 and deserves to be quoted at length:

> If Justice Marshall meant that he would draw the *Tashjian III* line by allowing the state to prohibit the party from inviting voters affiliated with another party to vote in its primary, then this *dicta* may have been made without thoughtful distinction between a challenge to state regulations that comes from an individual, and one that comes from a party.
>
> In support of this reference to the "disorganization effects," Justice Marshall refers to *Storer v. Brown* and *Rosario v. Rockefeller*. *Storer* and *Rosario* must be put in their proper perspectives – both cases involved challenges to statutes by individuals, and in neither case was there a contradictory party rule. In *Storer*, the court upheld a California statute prohibiting a person from running as an independent candidate for elective office if he or she had been enrolled in a party within the previous year. The *Rosario* court upheld a waiting period before a person could vote in a primary of one party after leaving the enrollment of another party.
>
> Just as the alleged "disorganization effects" could not stand against the party's rule in *Tashjian III*, so must it fail as justification for a state regulation prohibiting the party from inviting persons affiliated with another party. As to the political party who invites the voter formerly

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get anywhere near 10 percent of the vote in Oklahoma elections, it is an incredible stretch to believe it would ever draw more than a small number of Republicans and Democrats.

affiliated with another party, the state regulation would amount to the prevention of disruption from within the party, which is beyond the state's power. Concededly, there could be "disorganization effects" on the party with whom the voter is formerly affiliated; but these disorganization effects pale in the light of the importance of the political party's ability to seek adherence or members. "Under these circumstances, the views of the State, which to some extent represent the views of the one political party transiently enjoying majority power, as to the optimum methods for preserving party integrity lose much of their force." Allowing a voter registered in one party to vote in the primary of another party at its invitation fosters a competitive spirit between the parties and is consistent with American political thought and practice.[17]

The next sentence in footnote 13 in *Tashjian* applies to neither the fact situation in *Tashjian* or the one found in the case at bar. A state surely has a right to limit each voter to a single nominating act. Just as this Court found that the relief requested in *Tashjian* by the Republican party would not have allowed a primary voter to vote in more than one primary or commit more than one nominating act at a time, so too the relief requested by the LPO in this case does not include "fusion voting," but only that a voter make a choice as to whether to participate in the Libertarian primary or that of the political party in which they are currently registered. In fact, the parties in the case below stipulated that if the LPO were allowed to open

[17] Robert I. Berdon, The Constitutional Right of the Political Party to Chart Its Own Course, Defining Its Membership Without State Interference, 22 Suffolk U. L. Rev. 933, 967-968 (1988).

its primary election to all voters at the individual voter's choice, each voter would only be able to receive one ballot selection in order to cast his or her vote (Pet. App. 34). Therefore, as in this Court's decision in *Tashjian*, the state's right to allow only a single nominating act is not involved in the instant case.[18]

Finally, the last two sentences of footnote 13 in *Tashjian* stress that the decision of the Court in the foregoing situations must consider the "particular facts involved." Therefore, rather than the false dilemma created by the Petitioners that the choice is between allowing a political party at its whim to open its primaries to voters of other political parties or allowing a state always to ban party-option open primaries, the last two sentences of footnote 13 in *Tashjian* caution that each case must be looked at individually. Were the election laws or parties involved different in the case at bar, then it might well be that the results would be different. However, it is the uniqueness of the LPO's situation under Oklahoma Election Law which calls for the affirming of the Tenth Circuit's decision in *Beaver*.

[18] The State's right to limit a voter to a single nominating act is similar to the State's right upheld in *Timmons v. Twin Cities Area New Party*, supra, which required a candidate to make a single choice as to which party he wished to be the nominee of and prevented another political party from undertaking a simultaneous nomination of the candidate. The voter in the instant case or the candidate in *Timmons* must make a single choice, viz.: which primary to vote in or which party to be a candidate of. *Timmons* is not in conflict with the case at bar.

B. As Applied To The Libertarian Party Or Newly Recognized Political Parties, Oklahoma's Ban On Party-Option Open Primaries Is Neither Reasonable Nor Politically Neutral.

In Oklahoma, there are significant differences as to the effect of the election laws on the major parties and a small political party such as the LPO. As this Court has recognized the " . . . fact is that there are obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other." *Jenness v. Fortson*, 403 U.S. 431, 441 (1971). As already explained, Oklahoma's rigid ballot access and voter registration laws, while having little or no effect on the major parties, combine to limit drastically the number of registered Libertarians eligible to vote in the primary election in those years when the LPO succeeds in obtaining recognition as a party.

While the District Court and the Petitioners seem to think that the election laws in Oklahoma are nondiscriminatory, the fact of the matter is that "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." *Jenness v. Fortson*, 403 U.S. at 442. The interest of the State is not so much political stability and integrity, but the protection of the status quo. As the District Court noted, "where statutory law is concerned, the state is the creature of the parties in power, e.g., *Williams v. Rhodes*, 393 U.S. 23, 31-32 (1968), and is thus a bit suspect as a disinterested rule maker." (Pet. App. 67.) Further, this Court commented on the problem of major party control of legislative decisionmaking in *Anderson:* "Even though the drafting of election

laws is no doubt the handiwork of the major parties that are typically dominant in state legislatures, it does not follow that the particular interests of the major parties can automatically be characterized as legitimate state interests." *Anderson v. Celebrezze*, 460 U.S. at 803, n. 30.

Therefore, as this Court has noted "because the interests of minor parties and independent candidates are not well represented in state legislatures, the risk that the First Amendment rights of those groups will be ignored in legislative decisionmaking may warrant more careful judicial scrutiny." *Id.* at 793, n. 16. In *Anderson*, this Court particularly noted that "Ohio's asserted interest in political stability amounted to a desire to protect existing political parties from competition. . . . " *Id.* at 801. "Competition in ideals in governmental policies is at the core of our electoral process and of the First Amendment freedoms." *Id.* at 802. As this Court went on to say, "we did not suggest that a political party could invoke the powers of the State to assure monolithic control over its own members and supporters. Political competition that draws resources away from the major parties cannot, for that reason alone, be condemned as 'unrestrained factionalism.'" *Id.* at 803.

Oklahoma's inattention to the needs of minor parties is most strikingly evident in the obstacles the State has placed in the way of voters who wish to register and vote in the primary of a newly recognized party. Other states, e.g., New Hampshire, make provision for voters registered as Independents and as members of other political parties to have the opportunity to vote in the primary of a newly recognized political party – as occurred for the newly recognized Libertarian party in 1992 (R.T. 124-125). (See N.H. Rev. Stat. Ann. § 659.14(I) (2004)). If Oklahoma had

a statute similar to the New Hampshire statute, or even if this case involved an attempt by the Oklahoma Democratic or Republican parties to have a party-option open primary, the case at bar would be a far different one than we are confronted with herein. The Republicans and Democrats in Oklahoma do not have the LPO's problem because of their long-standing recognition and the ability of voters to register with them and to maintain their registration (or switch it to the other party) so that the voters may vote in the political primary that they desire. The Republicans and Democrats and their potential voter converts have opportunities which the LPO and any other newly recognized political party in Oklahoma simply do not have.

C. This Case Is Not Analogous To *Timmons v. Twin Cities Area New Party*.

There are several major distinctions between this case and *Timmons v. Twin Cities Area New Party* which render *Timmons* inapplicable here. *Timmons* disallowed the New Party from using the nominee of another political party as its nominee. As the Court said in *Timmons*, the laws in question:

> . . . are silent on parties' internal structure, governance, and policymaking. Instead, these provisions reduce the universe of potential candidates who may appear on the ballot as the party's nominee only by ruling out those few individuals who both have already agreed to be another party's candidate and also, if forced to choose, themselves prefer that other party. *Id.* at 363.

Thus, *Timmons* would be truly analogous to this case only if the LPO were asking that Oklahoma voters who are

registered as Republicans and Democrats be allowed to vote in both their own party primary and the LPO primary. But this case does not involve "fusion primary voting" – i.e., voters voting at the same primary election in both their own party primary *and* the LPO primary.

As opposed to the laws challenged in *Tashjian* and *Eu v. San Francisco Democratic Committee*, 489 U.S. 214 (1989), Minnesota's law against fusion candidates did not involve "regulation of political parties' internal affairs and core associational activities." *Timmons*, 520 U.S. at 360. In this case, the LPO is only asking that major party voters have a choice to choose their own party *or* the LPO – a party which Republicans and Democrats have had limited or next to no chance to register in.

Another distinction between *Timmons* and this case is that in *Timmons* – despite the Supreme Court's ruling disallowing dual party nominations – the candidate would still be on the ballot and all voters in the state would still be able to vote for the candidate in the general election. In this case, the Republican and Democratic voters are absolutely prohibited from voting in the LPO primary under the current law. Of course, another important distinction is that the Minnesota of the *Timmons* case is an open primary state: Minnesota voters can vote in any primary of their choice since there is no political party registration of voters in Minnesota.[19]

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[19] Testimony in the record in the case below was that there were 29 states and the District of Columbia which allowed voters to register as members of political parties, while 21 states had voter registration without allowing registration by political party (R.T. 84). In regard to the 29 states which allowed registration by political parties, 26 states provided registration for the political party of the voter's choice, while

(Continued on following page)

While the District Court reasoned that " . . . in the case at bar, the rule contended for by the Plaintiffs would be applied to the [LPO] by consent and to the other parties without their consent," (Pet. App. 69) the District Court once again confuses the Republican and Democratic parties with the individual party voters. Not only is there no evidence in the case at bar that the Republican and Democratic parties of Oklahoma have any objection to their individual members accepting an invitation to vote in another party's primary (as evidenced by the failure of both party Chairmen to appear at the trial below – J.A. 100; R.T. 242), but it should be further considered that the Republican and Democratic parties through the State of Oklahoma freely let their members not vote in their own primary elections. Certainly the allure of "going fishing" on Election Day is greater for Republicans and Democrats than the LPO primary.

The District Court stated that the "Court, in *Timmons,* answered the New Party's complaint by noting that the New Party was free to attempt to persuade the candidate to switch parties [and that] practical remedy is equally available here. . . . " (Pet. App. 71). However, as has been demonstrated herein, while the candidate of the Democratic-Farmer-Labor Party in *Timmons* could have switched to and become the New Party's candidate, in this case it is virtually impossible for Republicans and Democrats in Oklahoma to switch in time to vote as registered members in a primary of a newly recognized political

three states did not (R.T. 84). In fact, in several states, including California, Delaware, and Louisiana, a new political party can gain recognition and ballot status by having a certain number of voters register with the political party seeking party recognition (R.T. 86).

party. Nothing could be more revealing as to the misapplication of the *Timmons* case to the issues in this case than the language used in the District Court's opinion that " . . . the fact that a state may bar one party from poaching another party's candidates without violating the First and Fourteenth Amendments possibly suggests the state may bar a party from poaching another party's primary election voters." (Pet. App. 71). The use of the term "poaching" reminds one that in poaching a hunter captures or kills an animal, but doesn't extend an invitation to the animal to join the hunter as a captive or victim. Because the LPO would not be forcibly taking (as a hunter would poach) the voters of another party, but would instead extend an invitation, the distinction between this case and this Court's decision in *Timmons* is clear. The use by the District Court in its decision and the Petitioners in their Brief of the term "poaching" speaks volumes about a certain view of a political party's control over and relationship to its registered voters. The Tenth Circuit sets forth a better view:

> By finding protection against poaching of other parties' voters to justify the regulations at issue, the district court effectively would add a new associational right that has to this point been absent from constitutional discussion – the ability of a group to harness and control the associational opportunities of its members. *Beaver,* 363 F.3d at 1061 (Pet. App. 22)

While this Court has previously held that a state may not prevent a political party from opening up its primary election to Independent voters, *Tashjian,* this Court has not yet specifically addressed the issue of whether a state may prevent a political party from conducting a totally open primary election if the political party so chooses. As

noted in *Cool Moose*, this Court has held that the freedom to associate with others for the advancement of political beliefs and ideas is a form of "orderly group activity" protected by the First and Fourteenth Amendments and "[t]he right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." *Cool Moose,* 183 F.3d at 82, quoting, *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973).

The fact situation and law in Rhode Island in the *Cool Moose* case is somewhat similar to the fact situation and law in this case in Oklahoma. Like Rhode Island, Oklahoma has a semi-closed primary system that allows political parties to have the choice of inviting registered voters who are Independents to vote in their primary election, but not registered voters from other parties. However, Rhode Island, unlike Oklahoma, allows voters to register as members of unrecognized political parties. In fact, under the registration laws of Rhode Island, 1,010 Rhode Island registered voters registered as members of the Cool Moose party. (Def. Ex. 9, J.A. 39). Even so, the Court said in *Cool Moose*, quoting *Tashjian*:

> The statute here places limits upon the group of registered voters whom the Party may invite to participate in the "basic function" of selecting the Party's candidates. The State thus limits the Party's associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action and hence political power in the community. *Cool Moose Party v. State of Rhode Island, supra*, at 85, quoting *Tashjian v. Republican Party of Connecticut, supra*, at 215-216.

Timmons, by contrast, did not limit or prevent the choice of the candidate to join the New Party as its nominee.

III. UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE, OKLAHOMA'S BAN ON A PARTY-OPTION OPEN PRIMARY IS UNCONSTITUTIONAL UNDER EITHER STRICT OR INTERMEDIATE SCRUTINY.

Contrary to the pronounced exaggerations and broad oversimplifications of Petitioners' interpretation of the holding of the Tenth Circuit below, both the Tenth Circuit in *Beaver* and the First Circuit in *Cool Moose* exercised caution in considering the justifications put forth by the State and the proof presented in the record in determining whether a ban on a party-option open primary was constitutional. Neither Court of Appeals held that a political party could always, under any circumstances, open up its primary to members of other parties. Rather, in basing its decision on the record before it, the Tenth Circuit in *Beaver* found that the State had failed to make its case that a party-option open primary for the LPO would impair compelling interests in political party integrity and political stability just because it might possibly result in a few changed election results in the primaries of the major parties. *Beaver*, 363 F.3d at 1060 (Pet. App. 20).

The Petitioners misread the decision in *Tashjian* to mean that a party-option open primary may never be permitted. In a similar vein, Petitioners seem to believe that the decision of the Tenth Circuit in *Beaver* will always mandate the use of party-option open primaries. Actually, the Petitioners are wrong on both counts. In fact, *Tashjian* did not rule on whether a party has a right to open its primary to members of other parties. Rather, footnote 13

in *Tashjian* is *dicta* and simply suggests that a Court exercise caution in considering precisely what is the compelling state interest urged by the State and whether the State has offered sufficient proof that forbidding a party-option open primary is necessary to protect that interest. Just as the State in *Tashjian* failed to make its case in the record, so the record in the case below (as well as the record in *Cool Moose*) did not support the alleged interest of the state in banning the LPO from inviting registered members of other political parties to vote in its primary election. Therefore, the Tenth Circuit was correct in its ruling based on the particular circumstances, facts, and record in the case below. Rather than disregarding the language of *Tashjian* as Petitioners contend, the Tenth Circuit specifically followed the guidance and teaching of *Tashjian* in considering its decision.

Additionally, Petitioners are wrong in believing that the decision of the Tenth Circuit will always mandate the use of a party-option open primary. Not only is the decision below limited to the facts involving the LPO and its request for a party-option open primary, but this Court's decision in *Jones* does not mandate an across-the-board decision one way or the other on the party-option open primary. Instead, as the Tenth Circuit noted, this case lies squarely between *Tashjian* and *Jones*. Just as *Tashjian* had required the Connecticut regulation in question to be narrowly tailored to advance a compelling state interest, *Tashjian*, 479 U.S. at 217, *Jones* also required California to demonstrate that its regulations were narrowly tailored to serve a compelling state interest and on the record found that none of the interests was sufficiently compelling. *Jones*, 530 U.S. at 581-582, 586. Thus, instead of misreading this Court's decision in *Jones*, it is clear that

the Tenth Circuit carefully considered *Jones* and *Tashjian* and looked to the record in the case below in reaching its decision.

The Tenth Circuit also applied the correct standard in considering the issues in the case at bar. The Tenth Circuit found that when a state attempts to regulate and control the boundaries which a political party wishes to exercise for its own primary election, the burden on associational rights is severe. In citing a number of decisions of this Court, the Tenth Circuit noted below that when states attempt to restrict political parties from defining the bounds of their own association, this Court closely scrutinizes the State's attempt at regulation of the political party's rights to political association. *Beaver*, 363 F.3rd at 1056; citing, *Jones*, 530 U.S. at 582; *Eu v. San Francisco Democratic Comm.*, 489 U.S. at 225; *Tashjian*, 479 U.S. at 225; *LaFollette*, 450 U.S. at 124, and *Cousins v. Wigoda*, 419 U.S. 477, 489 (1975). The Tenth Circuit began its review of the statutes in question by using the balancing test of *Anderson v. Celebrezze*, just as the First Circuit did in *Cool Moose*.

> A court . . . must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interest put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. *Anderson v. Celebrezze*,

supra, at 789. *Beaver,* 363 F.3d at 1055 (Pet. App. 10-11).

The Tenth Circuit considered this Court's holdings that a reviewing Court should consider whether or not the burden is severe – requiring that the regulation be narrowly tailored and advance a compelling State interest, or whether the burden is less severe – in which case important regulatory interests are generally enough to justify the regulation. *Timmons v. Twin Cities Area New Party,* 520 U.S. at 358-359; and *Burdick v. Takushi*, 504 U.S. at 434 (Pet. App. 11).

While the Petitioners and Amici in their Briefs seem to feel that the Tenth Circuit has basically ended the power of states under any record to prevent party-option open primaries, both the Tenth Circuit in this case and the First Circuit in *Cool Moose* were models of restraint in limiting their decision to the facts and circumstances presented in the records in the District Court. This Court has acknowledged "the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party select[s] a standard-bearer who best represents the party's ideologies and preferences." *Jones*, 530 U.S. at 575. The selection of a standard-bearer who best represents the LPO's ideologies and preferences would have best been served if Republicans and Democrats who were Libertarian-oriented and who did not have an equal opportunity to change their registration in time to vote in the LPO primary could vote in the LPO primary.

While the District Court correctly found that the State's argument that it was trying to protect the LPO from raiding and swamping by voters from other political

parties was both unpersuasive and essentially a paternalistic justification for Oklahoma's present semi-closed primary system, the District Court overlooked an equally important question: What could be more paternalistic than protecting the Republican and Democratic parties in Oklahoma from having a few of their registered voters exercise their individual free choice by voting in the LPO primary? So what if some individual Republicans and Democrats defect to vote in the Libertarian primary – so much the better for "common principles" within the Republican and Democratic parties.

Indeed, the Republican and Democratic parties would be more likely to have standard-bearers who best represented their parties' ideologies and preferences if their party could be rid of members who would have rather voted in the LPO's primary but did not have the chance. As has been shown above, a party-option open primary would not only aid the LPO, but would not harm the major political parties. Like-minded voters would be drawn to the political party that they most associated with if they had the opportunity to make the choice freely in an equal manner, no matter which political party they were drawn to. The Tenth Circuit cited to the political stability shown by party-option open primary states like Utah and Alaska in its decision[20], and, as noted above, New Hampshire has also found a way to provide reasonable and non-discriminating treatment to newly recognized political parties, their primary elections, and those voters registered

[20] See Utah Code Ann. §§ 20A-3-104.5 and 20A-9-403(2)(a) and Alaska Stat. §§ 15.25.010, 15.25.014, and 15.25.060; *O'Callaghan v. State*, 6 P.3d 728, 732 (Alaska 2000), as shown in the record below (R.T. 109-114).

with other political parties who might wish to switch to the new political party in a timely manner. N.H. Rev. Stat. Ann. § 659.14(I)(2004).

It is important to note that there would have been no case and controversy in *Jones* had the Democratic, Republican, Libertarian, and Peace and Freedom Parties not objected to the blanket primary set up under the law of California. In this case, although the District Court asserted that a party-option open primary would affect other political parties, neither the Republican nor Democratic parties in Oklahoma intervened in the case. Not only does it appear that neither the Republican nor Democratic parties objected to a party-option open primary, but it is paternalistic speculation to imagine that a party-option open primary would adversely affect the other parties. After all, those party members who choose to vote in the primary will always choose the party nominees, even if a few might choose to vote in the LPO primary. It is for each individual political party, not for the state, to decide what is in the best interest of the parties.

As this Court stated in an opinion written by Justice Scalia:

> What we have not held, however, is that the processes by which political parties select their nominees are, as respondents would have it, wholly public affairs that States may regulate freely. To the contrary, we have continually stressed that when State's regulate parties' internal processes they must act within limits imposed by the Constitution. *Jones,* 530 U.S. at 572-573.

As the Court went on to note " . . . when the election determines a party's nominee it is a party affair as well,

and, as the cases to be discussed in the text demonstrate, the constitutional rights of those composing the party cannot be disregarded." *Id.* at 573, n. 4.

In his concurring opinion in *Jones*, Justice Kennedy makes it quite clear that it is the party's choice and not the State's choice as to how the political party will exercise its political associational freedoms under the First Amendment with respect to the limits of participation in its primary election.

> It may be that organized parties, controlled – in fact or perception – by activists seeking to promote their self-interests rather than enhance the party's long term support, are shortsighted and insensitive to the views of even their own members. A political party might be better served by allowing blanket primaries as a means of nominating candidates with broader appeal. Under the First Amendment's guarantee of speech through free association, however, this is an issue for the party to resolve, not for the State. *Id.* at 587 (Kennedy, J., concurring).

It is especially important to note that nowhere in *Jones* does this Court indicate that other political parties, through the mechanism of state government, can prevent a party from opening up its primary election to voters registered in other political parties if it so chooses. It follows by logical extension that Oklahoma is limited under the First Amendment when it attempts to constrict expanded voter participation favored by a political party for its own primary election.

> When the State seeks to regulate a political party's nomination process as a means to shape and control political doctrine and the scope of

> political choice, the First Amendment gives substantial protection to the party from the manipulation. In a free society the State is directed by political doctrine, not the other way around. *Jones,* 530 U.S. at 590. (Kennedy, J., concurring)

As was noted by the First Circuit in *Cool Moose*, the Supreme Court's decision in *Tashjian* "does not purport to control [the instant issue], and in fact suggests that a state may well be able to offer sufficiently weighty rationales in support of a statute prohibiting affiliated voters from participating in the primary of another party." *Cool Moose,* 183 F.3d at 86. Nonetheless, the LPO would submit to the Court that the State has not offered "sufficiently weighty rationales" in order to defeat the fundamental rights of political association and free speech associated with the LPO and the individual voter's choice. All the State's alleged compelling interests are mere paternalistic conclusions and speculations that are not backed up by facts or expert testimony as they apply to Oklahoma law and the LPO.

The Petitioners' expert witness showed that voting patterns for registered members of the major political parties in Oklahoma is far different from the voting patterns of Independent voters. However, Dr. Darcy's conclusions from his studies (suggesting an absurdly high participation rate by major party voters in the LPO primary) reach incorrect conclusions because he relies on incorrect assumptions and models. It was for similar reasons that Dr. Darcy's opinions and conclusions were discounted and held to be not particularly relevant by a Trial Court in an earlier case. *Graves v. McElderry,* 946 F.Supp. 1569, at 1575-1576 (W.D. Okla. 1996).

The District Court claimed that the " . . . challenged legislation is not aimed at minor parties in general, as in ballot access cases, or at the LPO in particular." The District Court therefore concluded that the challenged laws were politically neutral (Pet. App. 60-61). The District Court then cited this Court's decision in *Burdick v. Takushi, id.* at 434 for the proposition that the challenged laws herein are "nondiscriminatory restrictions which the State's important regulatory interests are generally sufficient to justify." However, the *Burdick* case, while standing for the proposition the District Court says it does, did not concern an optional open primary, but the allowance of write-in voting for all voters. The reason why the regulation upheld in *Burdick* was considered neutral was because the write-in voting ban would apply to all elections and not just party primaries for parties which requested it.

Okla. Stat. tit. 26, § 1-104 is not neutral because it only affects the LPO which is the only political party in Oklahoma that has chosen to open up its party primary. Further, the LPO periodically has all of its registered voters purged and changed to Independent status whenever the Party fails to maintain its political party status in Oklahoma, "with the result that, to an inherently unmeasurable extent, voters who have Libertarian political inclinations will either come to rest on the roll of unaffiliated voters or will register with one of the major parties for no reason other than to avoid repeatedly being purged to unaffiliated status." (Pet. App. 62). Once again, the LPO is not in the same position as the major parties because of the constant registration changes for its members as well as it being the one party that is actually affected by Oklahoma's ban on a party-option open primary. Would it

not be more in the interest of the major parties that only persons loyal to those parties vote in their primaries? If a person is registered as a Republican or Democrat and is so uninterested or uninspired by those parties that he or she would rather vote in the LPO primary, then having that person vote in the LPO primary would not hurt the major party at all. In any event, the State needs to prove something more than mere speculation and paternalistic conclusions to justify a ban on an open primary for the LPO in the record presented in this case.

CONCLUSION

Wherefore, for all the foregoing reasons, the decision of the United States Court of Appeals for the Tenth Circuit should be affirmed.

Respectfully submitted,

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RELEVANT STATUTES

OKLA.STAT. TIT. 26, §1-102. PRIMARY ELECTIONS
(Laws 1974, c. 153, § 1-102, operative Jan. 1, 1975;
Laws 1977, c. 134, § 2.)

A Primary Election shall be held on the fourth Tuesday in August of each even-numbered year, at which time each political party recognized by the laws of Oklahoma shall nominate its candidates for the offices to be filled at the next succeeding General Election, unless otherwise provided by law. No candidate's name shall be printed upon the General Election ballot unless said candidate shall have been nominated as herein provided, unless otherwise provided by law; provided further that this provision shall not exclude the right of a nonpartisan candidate to have his name printed upon said General Election ballots. No county, municipality or school district shall schedule an election on any date during the twenty (20) days immediately preceding the date of any such primary election.

OKLA. STAT. TIT. 26, § 1-103.
RUNOFF PRIMARY ELECTIONS
(Laws 1974, c. 153, §1-103, operative Jan. 1, 1975;
Laws 1977, c. 134, § 3.)

If at any Primary Election no candidate for the nomination for office of any political party receives a majority of all votes cast for all candidates of such party for said office, no candidate shall be nominated by said party for said office, but the two candidates receiving the highest number of votes at said election shall be placed on the official ballot as candidates for such nomination at a Runoff Primary Election to be held on the third Tuesday of September of the same year. No county, municipality or

school district shall schedule an election on any date during the twenty (20) days immediately preceding the date of any such Runoff Primary Election.

OKLA. STAT. TIT. 26, § 1-108.
FORMATION OF NEW POLITICAL PARTIES
(Laws 1974, c. 153, § 1-108, operative Jan. 1, 1975;
Laws 1985, c. 269, § 1.)

A group of persons may form a recognized political party at any time except during the period between July 1 and November 15 of any even-numbered year if the following procedure is observed:

1. Notice of intent to form a recognized political party must be filed in writing with the Secretary of the State Election Board at any time except during the period between March 1 and November 15 of any even-numbered year.

2. After said notice is filed, petitions seeking recognition of a political party, in a form to be prescribed by the Secretary of the State Election Board, shall be filed with said Secretary, bearing the signatures of registered voters equal to at least five percent (5%) of the total votes cast in the last General Election either for Governor or for electors for President and Vice President. Each page of said petitions must contain the names of registered voters from a single county. Petitions may be circulated a maximum of one (1) year after notice is filed, provided that petitions shall be filed with said Secretary no later than May 31 of an even-numbered year. Said petitions shall not be circulated between May 31 and November 15 of any even-numbered year.

3. Within thirty (30) days after receipt of said petitions, the State Election Board shall determine the sufficiency of said petitions. If said Board determines there are a sufficient number of valid signatures of registered voters, the party becomes recognized under the laws of the State of Oklahoma with all rights and obligations accruing thereto.

OKLA. STAT. TIT. 26, §4-103.
PERSONS WHO WILL BECOME
QUALIFIED ELECTORS – TIME FOR REGISTRATION
(Amended by Laws 1997, c. 176, §5, eff. Nov. 1, 1997.)

Any person who will become a qualified elector during the sixty (60) days before the next ensuing election at which he could vote shall be entitled to become a registered voter of the precinct of his or her residence not more than sixty (60) and not less than twenty-four (24) days prior to said election.

OKLA. STAT. TIT. 26, §4-119.
CHANGE OF POLITICAL AFFILIATION
(Laws 2000, c. 358, § 7, eff. July 1, 2000.)

Any registered voter may change his or her political affiliation by executing a form prescribed by the Secretary of the State Election Board at any time prescribed by law for registration transactions except during the period from 5:00 p.m. on July 1 through 5:00 p.m. on September 30 in any even-numbered year. Information given by the voter shall be under oath. The county election board secretary in the applicant's county of residence shall hold any such application for political affiliation change received by the State Election Board, any county election board, any agency designated to accept voter registration applications

or any motor license agent as part of a driver's license or identification card application after 5:00 p.m. July 1 through 5:00 p.m. on September 30 in any even-numbered year or if a mail application is postmarked after 5:00 p.m. July 1 through 5:00 p.m. on September 30 in any even-numbered year or if a mail application is received without a postmark more than five (5) days after July 1 through 5:00 p.m. on September 30 in any even-numbered year.

OKLA. STAT. TIT. 26, §5-104.
PARTY MUST BE RECOGNIZED.
(Laws 1974, c. 153, § 5-104, operative Jan. 1, 1975.)

Candidates may file for the nomination of a political party only if said party is recognized by the laws of the State of Oklahoma.

OKLA. STAT. TIT. 26, §5-105.
CANDIDATE MUST BE REGISTERED – EXCEPTIONS
(Laws 1987, c. 27, § 1, eff. Nov. 1, 1987.)

A. To file as a candidate for nomination by a political party to any state or county office, a person must have been a registered voter of that party for the six-month period immediately preceding the first day of the filing period prescribed by law and, under oath, so state. Provided, this requirement shall not apply to a candidate for the nomination of a political party which attains recognition less than six (6) months preceding the first day of the filing period required by law. However, the candidate shall be required to have registered with the newly recognized party within fifteen (15) days after such party recognition.

B. To file as an independent candidate for any state or county office, a person must have been registered to vote as an independent for the six-month period immediately preceding the first day of the filing period prescribed by law and, under oath, so state.

OKLA. STAT. TIT. 26, §5-105.
CANDIDATE MUST BE REGISTERED – EXCEPTIONS
(Amended by Laws 2004, c. 53, § 7, emerg. eff. April 1, 2004.)

A. To file as a candidate for nomination by a political party to any state or county office, a person must have been a registered voter of that party for the six-month period immediately preceding the first day of the filing period prescribed by law and, under oath, so state. Except, however, to file as a candidate for nomination by a political party to any state or county office in 2004, a person must have been a registered voter of that party no later than December 21, 2003. Provided, this requirement shall not apply to a candidate for the nomination of a political party which attains recognition less than six (6) months preceding the first day of the filing period required by law. However, the candidate shall be required to have registered with the newly recognized party within fifteen (15) days after such party recognition.

B. To file as an independent candidate for any state or county office, a person must have been registered to vote as an independent for the six-month period immediately preceding the first day of the filing period prescribed by law and, under oath, so state. Except, however, to file as an independent candidate for any state or county office in 2004, a person must have been registered to vote as an independent no later than December 21, 2003.

OKLA. STAT. TIT. 26, § 5-110. FILING PERIOD
(Laws 1974, c. 153, § 5-110, operative Jan. 1, 1975.)

Declarations of candidacy provided herein must be filed with the secretary of the appropriate election board no earlier than 8:00 a.m. on the first Monday after Independence Day of any even-numbered year and no later than 5:00 p.m. on the next succeeding Wednesday. Said declarations of candidacy may be transmitted by United States mail, but in no event shall the secretary of any election board accept said declarations after the time prescribed by law.

OKLA. STAT. TIT. 26. § 5-110. FILING PERIOD
(Amended by Laws 2003, c. 162, § 1.)

Declarations of Candidacy provided herein must be filed with the secretary of the appropriate election board no earlier than 8:00 a.m. on the third Monday in June of any even-numbered year and no later than 5:00 p.m. on the next succeeding Wednesday. Such Declarations of Candidacy may be transmitted by United States mail, but in no event shall the secretary of any election board accept such Declarations after the time prescribed by law.

OKLA. STAT. TIT. 26, § 5-110. FILING PERIOD
(Amended by Laws 2003, c. 162, § 1; Laws 2004, c. 53, § 8, emerg. eff. April 1, 2004.)

Declarations of Candidacy provided herein must be filed with the secretary of the appropriate election board no earlier than 8:00 a.m. on the first Monday in June of any even-numbered year and no later than 5:00 p.m. on the next succeeding Wednesday. Such Declarations of Candidacy may be transmitted by United States mail, but

in no event shall the secretary of any election board accept such Declarations after the time prescribed by law.

(8)

No. 04-37

In The
Supreme Court of the United States

MICHAEL CLINGMAN, GLO HENLEY, KENNETH MONROE, THOMAS PRINCE AND THE OKLAHOMA STATE ELECTION BOARD,

Petitioners,

v.

ANDREA L. BEAVER, FLOYD TURNER, MINELLE L. BATSON, MARY V. BURNETT, MICHAEL L. SEYMOUR, TERRY L. BEAVER, ROBERT T. MURPHY, SHARON LYNN ATHERTON, ROGER BLOXHAM, STEVE GALPIN, RICHARD P. PRAWDZIENSKI, MICHAEL CLEM, WHITNEY L. BONTIN, JR., CHRISTOPHER S. POWELL, CHARLES A. BURRIS AND THE LIBERTARIAN PARTY OF OKLAHOMA A/K/A LIBERTARIAN POLITICAL ORGANIZATION,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF OF PETITIONERS ON THE MERITS

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REPLY BRIEF

RESPONDENTS HAVE FAILED TO SHOW THAT THE STATE OF OKLAHOMA'S SEMI-CLOSED PRIMARY IS AN IMPERMISSIBLE INFRINGEMENT ON RESPONDENTS' ASSOCIATIONAL RIGHTS.

Respondents are incorrect in their assertion that the burdens imposed on the voters and the Libertarian Political Organization ("LPO") by the State of Oklahoma's semi-closed election system are severe and that, as such, any state interests asserted must meet a compelling state interest. The burdens imposed on all of the Respondents are not severe but are important regulatory interests subject to a lesser standard. Under this appropriate standard, the semi-closed primary election system of the State of Oklahoma is constitutional and is not an improper infringement, under any standard, of any of the Respondents' First Amendment rights of political association.

A. LIKE THE TENTH CIRCUIT, RESPONDENTS HAVE FAILED TO PROVIDE A SUFFICIENT BASIS FOR OVERTURNING THE DISTRICT COURT'S FINDING THAT THE OKLAHOMA SEMI-CLOSED PRIMARY SYSTEM DOES NOT IMPOSE A SEVERE BURDEN ON RESPONDENTS' RIGHTS OF POLITICAL ASSOCIATION.

Respondents admit in their brief that neither *Jones* or *Tashjian* compel a finding that the Oklahoma semi-closed primary election statutes are severe or that the statutes must meet compelling state interests. Yet, in their response, Respondents assume that any burden upon the right to vote amounts to a severe burden subject to strict scrutiny and requiring compelling State interests for those restrictions. The Court of Appeals had already adopted that same position, basing its opinion on its reading of *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986). Pet. App. 12, 15. That assumption erroneously ignores the language of such post-*Tashjian* cases such as

Burdick v. Takushi, 504 U.S. 428 (1992) and *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997).

1. While the right to vote is a fundamental right, the "right to vote in any manner and the right to associate for political purposes through the ballot" are not absolute. *Id.* at 433 (*citing Munro v. Socialist Workers' Party*, 479 U.S. 189, 193 (1986)). As *Storer v. Brown*, 415 U.S. 724, 730 (1974) allowed, there must be substantial regulation of the election process if those elections are to be honest, fair and orderly within the democratic process. With that regulation, it is inevitable that some burden will necessarily be imposed upon each individual voter, his right to vote and his right to associate with others for political ends. *Burdick*, 540 U.S. at 433; *Anderson v. Celebreeze*, 460 U.S. 780, 788 (1983). Thus, "to subject every voting regulation to strict scrutiny and to require that regulation be narrowly tailored to advance a compelling State interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Burdick*, 504 U.S. at 433. Merely because a State's election system creates barriers to the voter which might limit the field of candidates from which the voter might choose "does not of itself compel strict scrutiny." *Bullock v. Carter*, 405 U.S. 134 (1972). When an election law imposes only reasonably non-discriminatory restrictions upon the First and Fourteenth Amendment rights of voters, "the States' important regulatory interests are generally sufficient to justify the restrictions." *Burdick*, 504 U.S. at 434, *citing Anderson v. Celebreeze*, 460 U.S. at 788. As the restrictions in this case are not severe but are "reasonable, non-discriminatory restrictions," the State's important regulatory interests are sufficient to uphold the statutory provisions and the accompanying restrictions. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997).

The district court reviewed the impositions imposed on the Respondents, both the individuals and the LPO, and correctly determined that the burdens imposed by the statutes were not severe. And while the Respondents have argued otherwise, neither the Respondents nor the Court of Appeals have provided sufficient basis to conclude that

the burdens imposed are severe burdens on Respondents' rights of association.

Respondents assert that the disaffiliation statutes serve no legitimate State interest and even if they do serve an interest, the burden imposed is severe requiring a compelling State interest, a burden the State cannot overcome. However, the requirement that a voter not be a registered member of another political party if he wishes to vote in a primary has never been considered to be a "severe" burden.

As a preliminary matter, it is far from clear that a party has any protectable associational interest in its relationships with members of *other* parties that it simply wishes to invite to vote in its primary. *See Tashjian*, 479 U.S. at 234-35 (Scalia, J., dissenting). The statutes at issue here do not attempt to regulate the LPO's relationship with its own members. Nor do they even regulate the LPO's efforts to recruit new members. Instead, they simply regulate the LPO's ability to form transitory "associations" with registered members of other parties, for the limited purpose of having those voters abandon their own parties' primaries and vote instead in the LPO's primary. Absent a showing that the First Amendment protects such transitory "associations" and the LPO has made no such showing here, the Oklahoma statutes cannot be deemed to burden protected associational rights at all.

But even if the First Amendment protects such limited associations, the Oklahoma statutes place no severe burdens on Respondents' associational rights. On this point, *Timmons* is instructive. There, the court made a specific point to review an alleged infringement on the Twin Cities Area New Party political party, which the Court reviewed under a standard less than strict scrutiny. Yet, the Tenth Circuit Court concluded here that, because the alleged burden was imposed on a political party, *Jones* and *Tashjian* required a finding that the restrictions were severe and that the statutes must be reviewed under a "compelling state interest" standard.

Likewise, the amicus brief offered on behalf of the Respondents incorrectly asserts that any interference with

a political party's determinations regarding who may cast a vote is a severe burden requiring a compelling state interest. Brief of *amicus curiae*, p. 12. This assertion ignores the explicit holdings in *Timmons* and *Burdick*, each of which applied a lesser standard of scrutiny in review of the burdens placed on the potential parties and voters by the election restrictions.

More importantly, the Oklahoma primary election scheme is not a regulation of the internal decisions or workings of the political party. The statutes simply are regulations requiring that a person be registered as a member of a party, or as an independent, before the person can vote in that party's primary elections. The requiring of registration of party members has never been considered an internal regulation. *See Rosario v. Rockefeller*, 410 U.S. 752 (1973). It follows *a fortiori* that a regulation that does not even require registration with the party at issue – but merely disaffiliation from any other parties – cannot be considered an internal regulation either.

Instead, the semi-closed primary and accompanying voter affiliation (or non-affiliation) requirement is a question external to the political party's own activities. In fact, the registration requirement does not limit the party's ability to elect whomever they choose. It simply requires that an individual register with that party, or register as an independent, before he may vote in that party's primary.

Even the court in *Rosario* refused to apply strict scrutiny or require a "compelling State interest" in its consideration of the New York disaffiliation statutes. To be sure, the Supreme Court did not specifically state a standard of review in considering New York's imposition of a time limit for enrollment in a political party. But the terminology and analysis used by the Court reflects the use of the "rational basis" test. The use of that test was specifically noted by Justice Powell in his dissent. *Id.* at 767. In *Rosario*, this Court found that although the time limit burdened the associational rights of the individuals seeking to vote in a party's primary, the registration/disaffiliation statute was constitutional because it served a

"legitimate purpose and [was] in no sense insidious or arbitrary." *Id.* at 762. This Court specifically noted that New York's statutes did not prohibit persons from voting or from association with the party of their choice but "merely imposed a legitimate time limitation" on the voter's registration. *Id.* at 762. Even Justice Powell, in his dissent, agreed that a voter registration cutoff date of less than eleven months "say 30 to 60 days" would be a reasonable restriction on voter registration. *Id.* at 771.

Respondents try to support the idea of a severe burden by focusing on the fact that under Oklahoma law a party member wishing to vote in another party's primary must change her registration (either to the new party or to independent status) seven weeks prior to the primary.

Although Respondents are correct that *changes* of party affiliation are governed by § 4-119 of the Oklahoma election statute (rather than § 4-110.1, which deals with registration of previously unregistered voters), the State's restrictions on such changes are minimal. As noted in Petitioners' Brief, Okla. Stat. tit. 26, § 4-119 permits a voter to change political affiliation up to a time approximately seven weeks prior to the primary election. As the district court found, this short pre-primary registration deadline does not create a severe burden on the Libertarian Party Organization nor does it improperly restrict any voter's or party's right to political association. *See Rosario v. Rockefeller*, 410 U.S. 752 (1973).

No voter is locked into an undesirable or unwanted political affiliation. No voter is prevented from affiliating with whichever party he desires. (Such affiliation can be shown through but not limited to the joining of the party, supporting the candidates or party through monetary, vocal or in-kind support, attending party functions or rallies, etc.) No voter is prevented from voting in whichever primary he chooses so long as he follows the minimum requirements of party affiliation set out by the State.

The real problem with the Court of Appeals opinion and the Respondents' position is that neither wish to consider the close proximity of time between when a voter

must change his affiliation and the primary elections. In fact, the Court of Appeals opinion does not even address the time restrictions. The Court of Appeals found, and the Respondents argue, that any time restriction is an impermissible burden. The conclusion that any period of time is not just a burden but a severe burden on a voter's or party's associational rights, no matter the length of time between party affiliation and voting in that party's primary, is directly in conflict with a number of precedents from this court including *Rosario*.

2. Respondents' argument that Oklahoma's semi-closed primary imposes "severe" burden on their associational rights is also refuted by comparing the burdens alleged by Respondents with those at issue in this Court's prior decisions. In fact, contrary to Respondents' suggestions, the burdens imposed by a semi-closed system are smaller than the burdens imposed by any of the regulations at issue in this Court's decisions in this area over the past three decades. A comparison of the burdens upheld in this Court's prior decisions with those alleged by the Respondents in this case further refutes their contention that Oklahoma's semi-closed primary imposes a "severe" burden on their associational rights. Contrary to the Respondents' assertions, the burdens imposed by the semi-open primary at issue here are smaller than the burdens imposed by any of the regulations challenged in the Court's post-1970 decisions in this area.

In *Rosario v. Rockefeller*, 410 U.S. 752 (1973), the Court upheld a New York law requiring that citizens register as a member of a political party eight to eleven months prior to the primary election. In contrast, Oklahoma's semi-closed primary simply requires that a voter disaffiliate from his or her prior political party seven weeks before the primary. The Court in *Rosario* explicitly refused to apply strict scrutiny to the challenged regulations. *See* 410 U.S. at 757; *cf.* 410 U.S. at 767 (Powell, J. dissenting) ("The Court's formulation ... resembles the traditional equal protection 'rational basis' test.").

Two years later, in *Storer v. Brown*, 415 U.S. 724 (1974), this Court upheld California's requirement that

independent candidates disaffiliate with a political party at least one year prior to the primary election. Oklahoma's seven-week deadline is miniscule compared to the one-year deadline at issue in *Storer*. Additionally, a candidate who is seeking to serve as the party's standard bearer forms a more significant associational tie with a party than does the voter that simply votes in a primary. Yet in *Storer*, this Court upheld a law that was even more burdensome than either the law at issue in *Rosario* or the regulation it now considers as "expressive of a general state policy aimed at maintaining the integrity of the various routes to the ballot." *Id.* at 733.

Storer is not the only case where the Court has upheld burdens on *candidates* far in excess of the burden that Oklahoma places on *voters*. In *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), this Court upheld a Minnesota law banning candidates from appearing on more than one ballot. The law placed a burden not only on the candidates' speech, but also on the speech of the parties. Nevertheless, the Court explicitly held that this law did not "severely burden" associational rights. *Id.* at 360. In contrast, the Oklahoma law does not place any categorical restrictions on participation in the primary process, but merely requires a timely filing of disaffiliation.

In *Burdick v. Takushi*, 504 U.S. 428 (1992), the Court upheld Hawaii's blanket prohibition on write-in candidates. The Court noted that candidates could gain access to the ballot either through the partisan nomination process or through the "designated non-partisan ballot." All of these options required that a candidate and his supporters gather numerous signatures and file papers with the state well in advance of the election. The Court, however, explicitly declined to find a "severe" burden, writing that "[r]easonable regulations of elections *does* require [voters] to act in a timely fashion if they wish to express their views in the voting booth." *Id.* at 438. The Oklahoma law, in contrast, places no petition requirements and allows voter disaffiliation much closer to the election than did the laws upheld in *Burdick*.

Furthermore, those post-1970s cases in which the Court has struck down laws regulating primary and general elections present burdens on associational rights that far exceed the one presented by the Oklahoma law at issue here. In *Anderson v. Celebrezze*, 460 U.S. 780 (1983), the Court found that an Ohio law requiring that any candidate for president of vice-president register the March before the election placed "a significant state-imposed restriction on a nationwide election." *Id.* at 796. The Court placed special emphasis, however, on the fact that presidential elections had a uniquely national element, *see id.*, and that an effective presidential race places special burdens on candidates, *see id.* at 791. None of these elements are present in the Oklahoma law, since it allows voter disaffiliation much closer to the date of the election.

In *Eu v. San Francisco County Democratic Central Election Committee*, 489 U.S. 214 (1989), this Court struck down the extraordinary California regulation that sought to prohibit both primary endorsements by political parties as well as extensive regulations on the "organization and composition of official governing bodies" for the political parties. *Id.* at 229. Both of the provisions at issue in *Eu* sought to dictate the internal governance of a political party, regulating even the means by which the party would choose a state-wide leader. *Id.* at 230 (noting that the California regulations required that the state party chair could not be from the northern portion of California for two succeeding terms). Yet, even in *Eu*, this Court acknowledged that a "State may enact laws that interfere with a party's internal affairs when necessary to ensure that elections are fair and honest." *Id.* at 231. Here, however, Oklahoma seeks only to limit those who may vote in a particular primary. It in no way attempts to govern the internal structure of the party.

In *California Democratic Party v. Jones*, 530 U.S. 567 (2000), this Court struck down California's blanket primary system that required political parties to throw their elections open to all voters, regardless of even whether or not those voters were simultaneously participating in the primaries of other political parties. This regime robbed the parties of any means by which they could exert control

over who would become the standard bearer of its ideas. Further it removed a party's ability to exclude individuals from voting in its primary voters who had already registered as a member of another party. In stark contrast, the Oklahoma law does not deprive political parties of control over their own processes. Rather, it requires a simple administrative step (disaffiliation) before voters may accept a party's invitation to participate in its primary.

Finally, the burden presented by the Oklahoma law is significantly smaller than that presented by the law struck down in *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986). In *Tashjian*, the challenged law required that parties persuade voters to positively affiliate themselves with the party before participating in its primary. In contrast, the Oklahoma law requires only that the voters disaffiliate themselves from any other political party prior to casting their vote. Given the fact that these voters do not feel sufficient loyalty to the party that they are currently registered with to vote in that party's primary, persuading them to disaffiliate does not constitute a severe burden.

3. In their brief and for the first time in this action, Respondents challenge the Oklahoma statutes covering the recognition of political parties and the securing of ballot access as amounting to an unconstitutional infringement on their right to political association. Res. Br. 14-24. Respondents allege that those statutes, either individually or taken as a whole, make it impossible for a new or minor political party to gain or retain ballot access and incur growth and support. Respondents now allege that those statutes are the reason for the LPO's need for a semi-open primary. Respondents have thus asked the Supreme Court to look at Oklahoma's elections statutes as a whole and determine the constitutionality of not only Oklahoma's semi-closed primary but of the entire election system.

As a general rule, this Court does not decide in the first instance issues not decided below. *Cooper Industries, Inc. v. Aviall Services, Inc.*, 125 S.Ct. 577, 585 (2004) (*citing Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109 (2001)). To be sure, that rule is not inflexible, particularly where the

District Court and Court of Appeals acknowledged the issues and ruled on or made the factual findings necessary to resolve the question and where the Supreme Court has ordered those issues briefed and addressed. *See Capitol Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697-98 (1984). At the same time, "[o]nly in the most exceptional circumstances" does this Court deviate from the general rule. *Cooper Industries, Inc.*, 125 S.Ct. at 585 (*citing United States v. Mendenhall*, 446 U.S. 544, 551-52, n. 5 (1980)). No such exceptional circumstances exist in this case. *See Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 457 (1995) (*citing Yee v. Escondido*, 503 U.S. 519, 535 (1992))

In the question presented to this Court, Petitioners asked whether the Oklahoma statute limiting primary voters to registered members and independents was constitutional. The original issue raised before the district court was whether that very same semi-closed primary election scheme, specifically Okla. Stat. tit. 26, § 1-104(A) and § 1-104(B)(4), violated the First Amendment rights of political association of the individual Respondents and the entity known as the LPO. Neither the district court nor the Tenth Circuit was asked by any party to pass on the constitutionality of any other Oklahoma election statute including the ballot access/party recognition statutes, either as individual statutes, as an entire scheme or as related specifically to § 1-104(A) or § 1-104(B)(4). Specifically, Respondents sought relief "declaring that ... Okla. Stat. tit. 26, § 1-104(A) and § 1-104(B)(4) are illegal and unconstitutional, ... in that they are in violation of the First and Fourteenth Amendments to the United States Constitution ..." J. A. 22. That those sections are the only statutory provisions being challenged in this case by Respondents is reiterated elsewhere in their First Amended Complaint. J. A. 17-18. Nothing in that First Amended Complaint challenges the method or manner in which a political party becomes recognized nor does any opinion of the lower courts allege or find that the statutory provisions inhibit any First Amendment right.

Those issues were, likewise, not raised in Respondents' appeal to the Tenth Circuit Court of Appeals. Yet, Respondents are now asking this Court to pass judgment on all of

Oklahoma's political party recognition, ballot access laws asserting that those restrictions, along with the semi-closed primary system, improperly restrict Respondents' ability to exercise their First Amendment right to political association. It appears that Respondents are asking this Court to affirm the Tenth Circuit Court's opinion on grounds that were never raised or considered. That request is not proper at this stage.

The opinion of the Court of Appeals addressed only Okla. Stat. tit. 26, § 1-104 and whether a semi-closed primary violated Respondents' First Amendment rights. There was no review of any of the Oklahoma election statutes or any discussion of how § 1-104 was impacted by other election statutes or the LPO's past performance in Oklahoma elections. Of course, at the time the case was originally filed, the LPO was a recognized political party under Oklahoma statutes. Moreover, there has been no prior consideration in this case of Oklahoma's ballot access requirements whether it be by voter support or petition signatures. The Court of Appeals looked only at the semi-closed primary statute by itself and rendered an opinion without passing upon the other election statutes and the restrictions imposed by them.

Indeed, the restrictions purportedly caused by the remaining ballot access/election statutes may be a significant issue in each statute's own right and should only be considered where the statutes have been properly addressed by the lower courts and the parties. Whether those statutes, individually or as a whole, are ar unconstitutional infringement on the rights of Respondents, has not been put before the lower courts by any party nor have those courts considered those issues on their own accord. The validity and constitutionality of those statutes was not any part of the questions presented by the Petitioners' Petition for Certiorari.[1] The validity of Oklahoma's ballot

[1] In fact, the constitutionality of those statutes has previously been affirmed by the Tenth Circuit Court of Appeals. For a detailed analysis of the Oklahoma ballot retention access requirements and the opinion finding the Oklahoma ballot retention scheme to be constitutional, *see*

(Continued on following page)

access/party recognition statutes should be addressed in a separate action. The only issue presented here is whether Oklahoma's semi-closed primary system causes an improper infringement on a political party's right of political association if that political party wishes to conduct a different type of primary. Those other questions, if any, remain for another case on another day in another court.[2]

As part of the basis requesting this Court to review the entirety of the Oklahoma elections statutes, Respondents, relying on *Jenness v. Fortson*, 403 U.S. 431 (1971), now ask this Court to treat them as individuals and as the LPO differently due to its inability to gather sufficient support from Oklahoma over the past 24 years.[3] However, at the time this lawsuit was filed in 2000, the LPO was not dissimilar to

Coalition for Free and Open Elections v. McElderry, 48 F.3d 493, 495-97 (10th Cir. 1995).

[2] Even if this Court were to consider Oklahoma's ballot access laws, the Oklahoma statutory scheme including the semi-open primary system would be constitutional. Respondent party as well as other new or minor political parties have repeatedly been successful in gaining recognized party status and securing ballot access when attempted including Respondent party in every presidential election between 1980-2000. Even more restrictive requirements requiring a modicum of support have met with approval in *Jenness v. Fortson*, 403 U.S. 431, 438 (1971). Both the Oklahoma petition requirements and filing deadline have been specifically approved in *Rainbow Coalition v. Oklahoma State Election Board*, 844 F.2d 740, 747 (10th Cir. 1988). *See also, Populist Party v. Herschler*, 746 F.2d 656 (10th Cir. 1984). None of the ballot access statutes pose an impermissible burden on Respondents and do not, directly or indirectly, affect the Respondent party's primary elections or the issues raised in this case. *See also,* footnote 2.

[3] As evidence of the State's purportedly burdensome restriction on minor parties, Respondents cite the statutory scheme which provides that after a party, in this case the Libertarian Party, loses recognized political party status, the group becomes a legal entity known as a political organization. Okla. Stat. tit. 26 §§ 1-109 and 4-112. As a political organization, voters may register as a member of that political organization but the entity may not conduct primary elections and members may not vote in any other party's primary. That statutory scheme is the result of relief granted by the federal district court based on a request of five of these same Respondents who sued at that time as members of the Libertarian Party, seeking that specific relief. *Atherton v. Ward*, 22 F.Supp.2d 1265 (W.D. Okl. 1998).

the Republican or Democratic parties under the Oklahoma statutes. All three political parties were recognized political parties which had gained ballot access and which were authorized to conduct primary elections, when necessary. Each party, under the semi-closed primary system, was entitled to choose whether to allow independent voters to vote in its primary or whether to allow only party members to vote. Furthermore, each of the parties could retain ballot access with sufficient voter support.

In the present case, the Oklahoma statutes treat each recognized political party the same as any other recognized political party. When the LPO is recognized as political party with ballot access it is treated no different than any other recognized party and no other political party is given any advantage by the Oklahoma statutes as either written or applied.

The issue before this Court can be decided without review or passing judgment on the remaining election statutes. Any difficulty the LPO may have in securing or maintaining recognized political party status under those statutes is not relevant to this inquiry as the fact remains that the LPO has been able to repeatedly gain ballot access under the Oklahoma statutes as shown by Respondents own brief and by the fact that the LPO was a recognized political party at the time of the filing of the original lawsuit. The question before this Court is whether the State of Oklahoma's semi-closed primary system, in particular Okla. Stat. tit. 26, § 4-104, violates the Respondents' right to political association. The Court need not, and should not, pass on the appropriateness of any other Oklahoma election statute at this time.

B. LIKE THE TENTH CIRCUIT, RESPONDENTS HAVE FAILED TO PROVIDE A SUFFICIENT BASIS FOR OVERTURNING THE DISTRICT COURT'S FINDING THAT THE OKLAHOMA SEMI-CLOSED PRIMARY SYSTEM IS SUPPORTED BY IMPORTANT REGULATORY INTERESTS.

The State of Oklahoma presented sufficient legitimate State interests to support the challenged statutory provision.

At trial, in both evidence and written pleadings, the Petitioners offered a number of State interests to support the semi-closed primary election scheme.

Those interests included maintaining the integrity of the political process and the integrity of the political parties by preventing party splintering and factionalism; maintaining the integrity of the election process and minimizing administrative concerns. Each of those interests amount to important regulatory interests of the State of Oklahoma.

1. Respondents admit that regulatory interests were set forth by the State of Oklahoma but assert that the State failed to produce sufficient, specific evidence to support the State regulatory interests. Respondents simply state that the potential for the problems raised by the State are nothing more than speculation and/or conjecture. Petitioners do not, and the District Court did not, agree with Respondents' contention. What the district court did find was that those interests submitted were sufficient to find important regulatory interests on behalf of the State. In any event, a "particularized showing of the existence" of the problems which the State regulations are intended to minimize is not generally required. *See Munro v. Socialist Workers' Party*, 479 U.S. 189, 194-95 (1986). The same day as *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), this Court in *Munro*, determined that a State's political or electoral system need not sustain actual harm or damage before acting to prevent, or at least minimize, the perceived or potential harm. The perception of a problem may be sufficient to sustain a State's important regulatory interests:

> To require States to prove actual voter confusion, ballot overcrowding, or the presence of frivolous candidacies as a predicate to the imposition of reasonable ballot access restrictions would invariably lead to endless court battles over the sufficiency of the "evidence" marshaled by a State to prove the predicate. Such a requirement would necessitate that a State' s political system sustain some level of damage before the legislature could take corrective action. Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights.

Munro, 479 U.S. at 195-96.

While this Court later modified that stance in *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 226-27 (1989), this Court has only gone so far as to require particularized proof when the Court has found the burden to be severe subject to strict scrutiny and requiring a "compelling State interest."

As noted, only where a burden on the right of political association is severe, must the State show a "compelling state interest" for its statutory restrictions. And while this Court has never defined what restrictions amount to a severe burden, the restrictions imposed in this case, as demonstrated above, do not amount to any significant, much less, severe burden on the associational rights of any of the Respondents.

Respondents further assert that the Petitioners have failed to show any actual harm to the State's interests and assert that the potential harm is speculative at best. This assertion relies on the holding of the Court of Appeals in which the court "acknowledge[d] that the district court's hypothetical" changed primary election results and adverse effects on the Oklahoma electoral process and interest in political stability "might come to fruition" but found, incorrectly, that none of those problems had yet occurred. Pet. App. 20. Of course, none of Oklahoma's concerns have yet come to fruition. There has been no Oklahoma election in which a "party-option" open primary has been conducted.

But both the Respondents and the Court of Appeals have requested and required more of the Petitioners than legally mandated requiring the State to prove these harming events will actually occur. *Munro* does not require this burden of proof. *Munro* specifically permits a State to use foresight in anticipation of harm or damage to

a State's political system. The only requirement is that the measures adopted by the State be reasonable and not "significantly impinge" on the voter's constitutional rights. *Munro*, 479 U.S. at 195-96.

2. There can be no doubt that the interests asserted by Oklahoma and found by the district court are substantial. Even *amici* for the Respondents recognize the important State interests in regulating elections and even maintaining the integrity of the political process which a State may accomplish through a semi-closed primary election system. For example, the Respondents' *amici* note the importance of closed and semi-closed primaries to maintaining the integrity and message of a political party:

> Candidate nomination systems that form clarity of program and ideology, such as closed and semi-closed primary systems, serve First Amendment purposes by giving the public greater control over the explicit policy choices and course of government.

Brief of *amici curiae* "Coalition" 6-7.

Thus, in the eyes of the *amici*, both open and semi-closed primaries have their place of importance in the American electoral system. If that is so, it must be left to the State to determine which primary scheme best serves the interests and needs of that State's electorate.

Elsewhere, *amici* for the Respondents, citing *Tashjian*, 497 U.S. at 216 and *Eu*, 489 U.S. at 224, provide support for yet another important State interest:

> Because the moment of choosing the party's nominee is the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community, freedom of association must mean a political party has a right to select a standard bearer who best represents the party's ideologies and preferences.

Brief of *amicus curiae* "Coalition," 11 (internal citations and quotations omitted).

But this broad statement also suggests that a political party has a right to have the best candidate selected without the interference of another party. In other words, if other political parties are allowed to poach a party's voters, that party may not "select a standard bearer who best represents the party's ideologies and preferences." The selection may be made instead by a skewed subset of the party, thereby unintentionally and perhaps detrimentally changing the party's message. Preventing this damage to the integrity of the political party, in this case the Democratic or Republican party, and ensuring a strong two party system, are significant, if not compelling, state interests. *See Timmons*, 520 U.S. at 367 ("The Constitution permits the Minnesota Legislature to decide that political stability is best served through a healthy two-party system."). This protection of the integrity of the election process and the interest in maintaining party integrity while preventing party splintering and unrestrained factionalism, which the Oklahoma statutes are designed to do, are clearly important if not compelling state interests.[4]

3. In any event, the evidence presented to the trial court was more than sufficient to show important regulatory interests for the State of Oklahoma in its statutory scheme. At the district court, the trial court conducted an extensive non-jury trial and received extensive testimony and documentary evidence, including testimony and reports from expert witnesses for both Petitioners and Respondents addressing Oklahoma's important regulatory interests and how the statutes were designed to promote those interests. Through evidence presented at the trial by the Petitioners' witnesses, including the expert witness, Dr. Bob Darcy, as well as Lance Ward and Michael Clingman, the past and current Oklahoma State Election Board

[4] In addition to promoting party integrity and cohesion, and the other benefits found by the district court, the semi-closed primary facilitates the parties' voter turnout efforts by fostering greater accuracy in registration rolls. *See* Brief of *Amici* States at 20-22.

Secretary, respectively, the State set forth an extensive list of interests served by the semi-closed primary system. The district court found that the expert witnesses "were well-qualified to address the matters which they addressed as expert witnesses." Pet. App. 45.

The district court found, among other interests, that the semi-closed primary furthers the State's legitimate interests in preventing the poaching of a party's members. The district court found, as a matter of fact, that a party-option primary, as sought by Respondents, would adversely affect the outcome of some primary elections of the other political parties in a way not permitted or intended by the current semi-closed primary system. Pet. App. 49. The district court also found, as a matter of fact, that a semi-closed primary system, particularly Oklahoma's primary scheme, promoted party loyalty. The district court rejected, as a matter of fact, the Respondent's contention that the proposed State interests were nothing more than a pretext for promoting the interests of a particular party.[5]

Both the Tenth Circuit and the Respondents disagreed with the findings of fact by the district court. The Court of Appeals used their disagreement to overturn the district court's decision. However, neither the Tenth Circuit Court of Appeals nor the Respondents have provided sufficient basis under the applicable standard of review for overturning the district court's factual findings.

Fed.R.Civ.P. 52(a) sets forth the standard governing appellate review of a district court's findings of fact stating "[f]indings of fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

[5] Respondents have also raised this argument in challenging the *Amici* States interest in this case. It should be pointed out to the Court that the State Legislatures of *Amici* States are almost evenly divided between those dominated by Republicans and those dominated by Democrats.

This Court has expounded on the "clearly erroneous" standard. In *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948), this Court stated that a "finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence, is left with the definite and firm conviction that a mistake has been committed." In *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969), the Court warned that the appellate court must remember that its function, in applying the clearly erroneous standard, is not to redecide the factual issues *de novo*. If the district court's findings of fact are plausible when reviewed in the light of the entire record, the appellate court is to treat the findings with deference and may not reverse even though that court may have reached a different conclusion. *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985).

In discussing its review of the evidence, the Court of Appeals paid homage to the "clearly erroneous" standard and noted how it was to be applied. When the Court of Appeals wanted to affirm a district court's finding that certain state interests had not been sufficiently shown, the Court would cite to that standard. However, no language in the opinion indicates that the Court of Appeals, upon disagreeing with the district court's findings of fact, applied the "clearly erroneous" standard. In fact, the opinion of the Court of Appeals reveals that the "clearly erroneous" standard was not applied by the Court.

In reviewing the concerns and facts relating to the detrimental effect of the draining of voters from the other political parties on the other parties as well as important regulatory interests of the State, the district court made extensive findings that the requested primary scheme would improperly affect the State's important regulatory interests and set forth manners in which those problems could or would occur. Pet. App. 47-49, 59. The Court of Appeals then purportedly found those findings of fact to be erroneous even though the Court of Appeals found that the problems which the district court believed would happen and which were based on the district court's factual findings "might come to fruition." Pet. App. 20. Clearly, if

the Court of Appeals found that the problems based on the district court's factual findings were possible, the Court of Appeals could not disagree with the district court's findings, much less find them to be "clearly erroneous." Since the Court of Appeals did not find that the facts upon which the district court based its decision were "clearly erroneous," the Court of Appeals decision to disregard those factual findings and render its decision based on the opinion that the facts were not sufficient to uphold the district court's opinion, the Court of Appeals decision must be reversed.

Neither the Tenth Circuit nor the Respondents have provided any legal basis for finding that the district court's findings of fact and conclusions extending therefrom were "clearly erroneous."

CONCLUSION

The district court was correct; the semi-closed primary system as operational in Oklahoma is not a severe burden on any voter's or political party's rights and is reasonably calculated to maintain important regulatory interests. The decision of the Tenth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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No. 04-037

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In The

Supreme Court of the United States

MICHAEL CLINGMAN, et al.,

Petitioners,

v.

ANDREA L. BEAVER, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF *AMICUS CURIAE* COALITION FOR FREE AND OPEN ELECTIONS IN SUPPORT OF AFFIRMANCE

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QUESTION PRESENTED

The question to be answered by this court is whether a political party is entitled under the United States Constitution to decide the basis on which to make its appeal to the public.

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INTEREST OF *AMICI*[1]

Amicus Northwest Legal Foundation is a non-profit public interest law firm focusing on constitutional First, Fifth and Fourteenth Amendment rights. The Northwest Legal Foundation has previously appeared as an *amicus* before this court[2] and before the Washington State Supreme Court.[3]

Amicus Coalition for Free and Open Elections (COFOE) includes representatives from several political parties including the Libertarian, Reform, Green, Socialist, Communist, Constitution, and Natural Law parties, and the Committee for a Unified Independent Party (CUIP). COFOE is the nation's largest coalition of third parties, and works to make ballot access and election laws more fair.

Amici believe the within brief will be of considerable help to this court on its review of the decision of the federal Court of Appeals for the Tenth Circuit in the case entitled *Beaver v. Clingman,* 363 F.3d 1048 (10th Cir. 2004). In offering this brief *amici* wish to make clear they take no position regarding what nominating rules the Libertarian Party of Oklahoma may adopt or wish to adopt in light of the political circumstances in Oklahoma, and might well disagree among themselves which rules to

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[1] The parties have consented to the filing of this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amici*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

[2] See, *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309 (1994).

[3] See, e.g., *R/L Associates, Inc. v. City of Seattle*, 113 Wash.2d 402, 780 P.2d 838 (1989), *Richmond v. Thompson,* 130 Wash.2d 368, 922 P.2d 1343 (1996).

adopt. Nonetheless, *amici* are unified in their belief that political parties, large and small, can best fulfill their historic role in American governance if allowed to decide the basis of their participation in the political process for themselves, and that the expressed state interests in the circumstances of this case have not been shown to warrant interference by regulation.

SUMMARY OF ARGUMENT

Political parties are an integral part of American governance. The First Amendment guarantees free exercise of political association rights. Free exercise of political association rights by both parties and voters furthers the purposes of the First Amendment. The First Amendment guarantees "broad" rights to political parties to adopt their own nominating rules. The burdens imposed by Oklahoma on the respondent political party members are severe, warranting strict scrutiny. The petitioners have not shown or articulated interests that overbalance infringement of the respondents' rights. Some interests articulated by the petitioners and their supporters are prohibited by the equal protection clause of the Fourteenth Amendment.

ARGUMENT

Political parties are an integral part of American governance.

Political parties are not just another set of special interest groups whose presence and demands the petitioners must suffer. "Representative democracy in any populous unit of governance is *unimaginable* without the ability of

citizens to band together in promoting among the electorate candidates who espouse their political views. The formation of national political parties was almost concurrent with the formation of the Republic itself."[4] (emphasis added)

Since the infancy of this nation political parties have performed the important functions of aggregating, coordinating and reconciling various political interests and providing the electorate with discrete normative visions of government and public policy. Indeed, under the Madisonian system of checks and balances, political parties are among the few coordinating forces that make any government action possible.[5] It may further be argued they are the only such force that is directly accountable to the people on a regular basis.[6]

Political party labels provide voters with important information regarding candidates. In addition, political parties tie candidates together in pursuit of common goals and policies, which the voters can collectively reward or punish every two years.[7] Stated alternatively, parties play an *essential* role "in brokering group interests and solving voter's collective action problems. A polity without parties places a greater cognitive burden on individual voters and

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[4] *California Democratic Party v. Jones*, 530 U.S. 567, 574, 120 S.Ct. 2402, 2408 (2000) (hereinafter *Jones*).

[5] See, e.g., E.E. Schattschneider, *Party Government*, 1 (1942); John Aldrich, *Why Parties?* 18 (1995).

[6] There are, for example, no provisions for a public referendum on the United States Constitution.

[7] *Ibid.*, n. 5.

weakens the collective responsibility of political parties."[8] The cases decided by this court "vigorously affirm the *special place* the First Amendment reserves for, and the *special protection* it accords, the *process* by which a political party 'select[s] a standard bearer who best represents the party's ideologies and preferences.'"[9] (emphasis added).

The First and Fourteenth Amendments guarantee free exercise of political association rights

"The ability of the members of the [named political] Party to select their own candidate . . . unquestionably implicates an associational freedom."[10] Alexis de Tocqueville wrote the right of association for political purposes is inextricably joined to the right to liberty:

> "The most natural privilege of man, next to that of acting for himself, is that of combining his exertions with those of his fellow creatures, and of acting in common with them. The right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society."[11]

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[8] Persily and Cain, *Symposium: Law and Political Parties: The Legal Status of Political Parties: a Reassessment of Competing Paradigms*, 100 Colum. L. Rev. 775, 787 (2000).

[9] *Jones*, 530 U.S. at 575.

[10] *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 235-236, 107 S.Ct. 544, 93 L.Ed.2d 514 (1986) (Scalia, J., dissenting) (hereinafter *Tashjian*).

[11] 2 A. de Tocqueville, *Democracy in America* 203 (Bradley ed. 1954).

Freedom of association for political purposes is a *fundamental liberty right* protected in the United States' Constitution.

> "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. The freedom of association protected by the First and Fourteenth Amendments includes partisan political organizations. The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom."[12]

The purposes of the First Amendment are best served by free exercise of political association rights by both parties and voters.

"[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs."[13] In *Tashjian* a group of nine political scientists told this court "[t]he fundamental objectives of the freedoms of speech, press, petition, assembly and association were to assist the people in self government and to permit the people to

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[12] *Tashjian, 479 U.S. at* 214 (citations omitted) (internal quotes omitted).

[13] *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 776-777, 98 S.Ct. 1407 (1978) (citation omitted).

thwart the abuse of power by their elected and appointed leaders."[14] Accordingly:

> "The appropriate solution to questions of political party structure depends upon the contextual questions of time, place and political objective. . . . It is fundamental to the First Amendment that there is no fixed immutable truth, no one position that parties may be expected to expound forever. As circumstances change, the parties must be free to explore the political requisites of the period. Hence, any legislation which denies to parties the opportunity to make a political choice which affects the message which it can espouse to the public – its nominations and platforms and all that the parties stand for – impoverishes public discourse."[15]

It is entirely legitimate at one time and place for the electorate to prefer moderate or centrist politics and greater competition between candidates. Candidate nomination systems favoring broad based consensus decision-making and competition, such as blanket and open primary systems, serve First Amendment purposes by allowing the public to coalesce around popular policy positions. It is equally legitimate at another time and place for the electorate to conclude that traditional politics have not worked and that programmatic or ideologically driven candidates are necessary and appropriate. Candidate

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[14] *Brief of Amici Curiae Seeking Affirmance*, James MacGregor Burns, Barbara Burrell, William Crotty, James S. Fay, Roman B. Hedges, John S. Jackson, III, Everett C. Ladd, Kay Lawson, Gerald Pomper, political scientists, p. 7., *Tashjian*, supra (85-766) (hereinafter *Tashjian Amicus*).

[15] *Tashjian Amicus*, at 10-11.

nomination systems that favor clarity of program and ideology, such as closed and semi-closed primary systems, serve First Amendment purposes by giving the public greater control over explicit policy choices and course of government.[16]

Professor McLuhan taught, "The medium is the message."[17] The nature, structure and operation of any primary electoral system informs and often determines the outcome of public discourse. The tension between "change" and "stability" in electoral models is what drives political discourse and is precisely what the First Amendment is designed to protect. "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, . . ."[18] Likewise, any statutory scheme that restricts the ability of one political party to formulate and promulgate its message in order to enhance the relative voice of other political parties violates the First Amendment and may violate the equal protection guarantees of the Fourteenth Amendment.[19]

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[16] *Id.*, at 14-24.

[17] M. McLuhan, *Understanding Media: The Extensions of Man* (Cambridge: The MIT Press, 1994).

[18] *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

[19] *Bullock v. Carter*, 405 U.S. 134, 141, 92 S.Ct. 849 (1972) ("Although we have emphasized on numerous occasions the breadth of power enjoyed by the States in determining voter qualifications and the manner of elections, this power must be exercised in a manner consistent with the Equal Protection Clause of the Fourteenth Amendment.") (citations omitted)); cf., *Dunn v. Blumstein*, 405 U.S. 330, 336, 92 S.Ct. 995 (1972) (right to vote is "a fundamental political right" under equal protection analysis).

> "Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the First Amendment of the Bill of Rights. Exercise of these basic freedoms in America has traditionally been through the media of political associations. Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents."[20]

A primary system wherein political parties can chart their own course between and within the alternatives of "change" and "stability" will self-modulate in response to voter preferences as expressed at the polls.[21] On the other hand, a state imposed system that limits either the "change" or the "stability" model or prefers one model to the other not only burdens the right of political parties to develop and promulgate their temporal messages; it also deprives the public of the flexibility necessary to fully exercise its own First Amendment right to choose consensus or ideological candidates as political conditions change.

Essential to a meaningful electoral contest is the ability to self-define the nature of the party and its message. "The nature of the nominating procedure determines the nature of the party; he who can make the nomination is owner of the party."[22] "A political party is not a public utility simply providing a power grid for candidates' messages. Parties shape the message, and for a state to

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[20] *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

[21] *Brief of Amicus Curiae Northern California Committee for Party Renewal*, at 14, *Jones*, supra (99-401).

[22] E.E. Schattschneider, *Party Government* 64 (1942).

control any party's central function of nominating is for the state to control the message."[23]

If the parties are deprived of their ability to define themselves and their goals through the nomination of candidates the public is presented with a false choice. Political discourse is thus impoverished, leading ultimately to a government that does not reflect the wishes of either the electorate or the political parties.

The First Amendment guarantees "broad" rights to political parties to adopt their own nominating rules.

Any authority states may have to regulate the "time, place and manner" of elections,[24] does not allow them to interfere with the nominating processes of political parties. This court has "continually stressed that when States regulate parties' internal processes they must act within limits imposed by the Constitution."[25] This court has also "said that 'implicit in the right to engage in activities protected by the First Amendment' is 'a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends'"[26]

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[23] *Brief of Amicus Curiae Northern California Committee for Party Renewal*, at 8, *Jones*.

[24] *Const. Art.* I, § 4.

[25] *Jones*, 120 S.Ct. at 2407 (citing *Eu v. San Francisco Democratic Comm.*, 489 U.S. 214 (1989) (hereinafter *Eu*), and *Democratic Party Of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981) (hereinafter *La Follette*) (footnote omitted).

[26] *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 256, 124 S.Ct. 619 (2003) (citing to *Roberts v. United States Jaycees*, 468 U.S. 609, 622, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984)) (hereinafter *Roberts*).

The First Amendment right of association "necessarily presupposes the freedom to identify the people who constitute the association, . . ."[27] "Since control over participation in a primary can profoundly influence the content of the compromise emerging from the primary election, a political party's ability to define its boundaries cannot be separated from the party's ability to determine its political ideology."[28]

> "In no area is the political association's right to exclude more important than in the process of selecting its nominee. That process often determines the party's positions on the most significant public policy issues of the day, and even when those positions are predetermined it is the nominee who becomes the party's ambassador to the general electorate in winning it over to the party's views."[29]

Taken together *Tashjian* and *Jones* confirm there was no constitutional distinction between the associational right of a political party to include participants and the associational right of a political party to exclude participants. "The Party's attempt to broaden the base of public participation in and support for its activities is conduct undeniably central to the exercise of the right of association."[30] "Freedom of association would prove an empty

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[27] *La Follette*, 450 U.S. at 122.

[28] Berdon, J. *The Constitutional Right of the Political Party to Chart its Own Course: Defining Its Membership Without State Interference*, 22 Suffolk U.L.R. 933, 965 (1986) (quoting Note, *Primary Elections and the Collective Right of Freedom of Association*, 94 Yale L.J. 117, 126 (1984)) (hereinafter *Berdon*).

[29] *Jones*, 120 S.Ct. at 2408.

[30] *Tashjian*, 479 U.S. at 214.

guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being."[31]

Because the moment of choosing the party's nominee is "the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community,"[32] freedom of association must mean a political party has a right to "select a standard bearer who best represents the party's ideologies and preferences."[33] Consistent with these principles this court has held that political parties have "broad" rights: to invite non-members to participate in their nomination process,[34] and the right to exclude non-members from participating,[35] the right to insist on loyalty to party principles[36] and the right to require a loyalty pledge from candidates.[37]

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[31] *Jones*, 530 U.S. at 574-575 (citing to *La Follette*, at 122, n. 22, 101 S.Ct. 1010 (quoting L. Tribe, *American Constitutional Law* 791 (1978)) and to *Roberts*, 468 U.S. at 623.

[32] *Tashjian*, 479 U.S., at 216.

[33] *Eu* 489 U.S. at 224; cf. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997) (hearinafter *Timmons*) ("[T]he New Party, and not someone else, has the right to select the New Party's standard bearer.").

[34] *Tashjian*, supra.

[35] *Jones*, supra; *La Follette*, 450 U.S. at 122.

[36] *Nader v. Schafer*, 417 F.Supp. 837, 847 (D.Conn. 1976), summarily aff'd, 429 U.S. 989 (1976).

[37] *Ray v. Blair*, 343 U.S. 214, 231 (1952).

The burdens imposed by Oklahoma on the respondent political party members are severe, warranting strict scrutiny.

Political parties and their right of association for the purpose of nominating candidates are entitled to "special protection." As clearly demonstrated above, any interference with party determinations regarding who may cast a vote in that process interferes with the party message and is therefore severe. Petitioners ask this court to substitute its judgment as to the severity of this burden. "But it is not for the courts to mediate the merits of this dispute. For even if the State were correct, a State, or a court, may not constitutionally substitute its own judgment for that of the Party. A political party's choice [concerning who may participate in its elections] is protected by the Constitution."[38]

The Tenth Circuit Court of Appeals correctly applied strict scrutiny to this case. Relying on *Anderson v. Celebrezze*,[39] it observed that a court

> "must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed

[38] *La Follette*, 450 U.S. at 123-124 (footnote following); cf., *Ripon Society, Inc. v. National Republican Party*, 173 U.S.App.D.C. 350, 368, 525 F.2d 567, 585 (1975) (en banc) ("[A] party's choice, as among various ways of governing itself, of the one which seems best calculated to strengthen the party and advance its interests, deserves the *protection* of the Constitution . . . ") (emphasis of the court), cert. denied, 424 U.S. 933, 96 S.Ct. 1147, 47 L.Ed.2d 341.

[39] 460 U.S. 780, 103 S.Ct. 1564 (1983).

> by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also *must consider the extent to which those interests make it necessary to burden the plaintiff's rights.*"[40] (emphasis added)

Then the Court of Appeals, relying on *Timmons*, noted the nature of the burden determined the level of scrutiny. The Court of Appeals observed that, with one easily distinguished exception, this court has employed strict scrutiny in cases where states had restricted parties from defining the boundaries of their own association.[41] Noting that this case falls squarely between *Tashjian* and *Jones* the Court of Appeals correctly applied strict scrutiny.[42]

The petitioners have not shown or articulated any interests that overbalance infringement of the respondents' rights.

Any interest that petitioners advance to justify a regulation must be germane to the subject matter it is attempting to regulate. "When it is shown that state action threatens significantly to impinge upon constitutionally protected freedom it becomes the duty of . . . [the] court to determine whether the action bears a reasonable relationship to the achievement of the governmental purpose

[40] *Clingman*, 363 F.3d at 1055; (quoting *Celebrezze*, 460 U.S. at 789). The significance of the highlighted portion will be discussed below.

[41] See, e.g., *Jones*, 530 U.S. at 582; *Eu*, 489 U.S. at 225; *Tashjian*, 479 U.S. at 225; *La Follette*, 450 U.S. at 124; *Cousins v. Wigoda*, 419 U.S. 477, 489 (1975).

[42] 363 F.3d at 1057.

asserted as its justification."[43] Having identified germane interests, if any, the state has the burden of proving that the interest is compelling.[44] The *Celebrezze* analysis, which this court has consistently followed for decades in election cases, states the court "must consider the extent to which those interests make it necessary to burden the plaintiff's rights."[45] This element of the *Celebrezze* test unavoidably requires a factual showing of necessity by the state.

> "Not to require the state to empirically demonstrate that there is a basis for the interest it claims to justify the regulations, or at least require specific legislative finding to support the claim, seriously devalues the party's associational rights. It seems incredible that an interest can be compelling without some factual basis to support it."[46]

In *Eu*, this court required the state to produce evidence that the regulation was necessary.[47] *Jones* analyzed California's asserted interests "*in the circumstances of this case*."[48] Recently this court reaffirmed that a state must show "more than assertion and conjecture" to support a compelling state interest.[49] Regardless what level of

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[43] *Bates v. City of Little Rock*, 361 U.S. 516, 525 (1960) (cited by *La Follette*, 450 U.S. at 128).

[44] *Oregon v. Mitchell*, 400 U.S. 112, 238 (1970).

[45] See, n. 38, supra, and related text.

[46] *Berdon*, at 959.

[47] *Eu*, at 233 ("In sum, a State cannot justify regulating a party's internal affairs without showing that such regulation is necessary to ensure an election that is orderly and fair.").

[48] *Jones*, 120 S.Ct. at 2413 (emphasis of the court).

[49] *Republican Party of Minnesota v. White*, 536 U.S. 765, 781, 122 S.Ct. 2528 (2002) (citing *Landmark Communications, Inc. v. Virginia*,

(Continued on following page)

scrutiny is applied, petitioners here are required but have failed to *demonstrate* why it is necessary to burden the respondent's rights.

In *Tashjian* the nine *amici* political scientists emphasized the conflict of interest legislatures have in making determinations about who may vote in a particular party primary.

> "To give the party in power control over the structure of its opponents undermines the ability of the latter to make its best contribution to our political process. That conflict of interest is certainly inherent in the decision about who can vote in the opposing party primary. Thus making that decision by legislation rather than by party rule, affords immense opportunities to thwart the attempt of the party out of power to set its own agenda and make its most useful contribution to political discussion."[50]

Professor Berdon echoed this sentiment in a law review article published contemporarily to *Tashjian*.

> Strict scrutiny for all infringements other than those that are insubstantial is absolutely essential because of the nature and importance of the right. To allow the majority party to impose regulations on the internal affairs of the minority party, and in particular, regulate who it can invite into the ranks of its association – either through formal membership, voting in primaries

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435 U.S. 829, 841 (1978), and *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816 (2000).

[50] *Tashjian Amicus*, at 8-9 (citations omitted).

or other forms of membership – could be disastrous.[51]

The petitioners and *Amici* States[52] vigorously attempt to portray this case as a voters' rights case.[53] Their reliance on *Rosario v. Rockefeller*[54] and *Burdick v. Takushi*[55] is misplaced because this is first and foremost a party rights case. Voters' rights, while implicated, are not material until *after* a political party exercises its "freedom to identify the people who constitute the association,"[56] which freedom the petitioners clearly deprive of the respondents.

To the extent petitioners attempt to assert the rights of other political parties in Oklahoma against so-called voter "poaching"[57] they do not represent or claim to represent these other parties and have thus failed to show they

[51] Berdon, 22 Suffolk U.L.R. at 952-953 (citing to BeVier, 73 Calif. L. Rev. 1045 (1985); *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*).

[52] See, Brief of the States of South Dakota, Maryland, Massachusetts, New Hampshire, New Mexico, North Carolina, West Virginia and Utah as *Amici Curiae* in Support of Petitioner filed herein (hereinafter *Amici States*).

[53] See, e.g., Brief of Petitioners on the Merits, at 8, 12, 15, 16, 18, 20, 21, 27-29.

[54] 410 U.S. 752, 93 S.Ct. 1245 (1973) (hereinafter *Rosario*).

[55] 504 U.S. 428, 112 S.Ct. 2059 (1992).

[56] *La Follette*, 450 U.S. at 122; and especially compare *Nader v. Schaffer*, supra, with *Tashjian*, supra (*Tashjian* held party entitled to *same associational rights* denied to voters by *Nader*); and see, generally, *Jones*, 530 U.S. at 575-576.

[57] Petitioners describe "poaching" as the act of "draining voters" from other political parties. Brief of Petitioners, at 21.

have standing to raise the matter.[58] Neither could they show any public interest in protecting the rights of other political parties without running afoul of the equal protection clause of the Fourteenth Amendment.[59] Finally, since "acts of public affiliation may subject the members of political organizations to public hostility or discrimination,"[60] some voters may publicly affiliate with one party to avoid hostility yet secretly support another, and thus it is conceivable that the respondents here, representatives of a *minor* political party, could also be *victims* of poaching.

The issue in this case is which voters a political party may invite to participate in nomination of its candidates, not when, or even if, a voter must register with the state by party. "Considered from the standpoint of the Party itself, the act of formal enrollment or public affiliation with the Party is merely one element in the continuum of participation in Party affairs, and need not be in any sense the most important."[61] Considered from the standpoint of government, twenty-two states have no voter registration by party.[62] Thus, party registration cannot be deemed "necessary" or "important" to the "integrity of the political process."

[58] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561, 112 S.Ct. 2130 (1992).

[59] E.g., *Bullock v. Carter*, supra; *Dunn v. Blumstein*, supra.

[60] *Tashjian*, 479 U.S. at 215, n. 5.

[61] *Tashjian*, 479 U.S. at 215.

[62] The following states do not register voters by party affiliation: Alabama, Arkansas, Georgia, Hawaii, Idaho, Illinois, Indiana, Michigan, Minnesota, Mississippi, Missouri, Montana, North Dakota, Ohio, South Carolina, Tennessee, Texas, Vermont, Virginia, Washington and Wisconsin.

To the extent *Rosario* deemed party registration a compelling interest, it was concerned solely with "party raiding," which this court has defined as a process "whereby voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party's primary."[63] Setting aside the question whether petitioners have adequately shown "party raiding" is indeed a palpable problem in Oklahoma,[64] the Supreme Court drew an important distinction in *Tashjian* and again in *Eu*, both decided more than a decade after *Rosario*. "[A] State may enact laws to 'prevent the disruption of the political parties from without' but not, as in this case, laws 'to prevent the parties from taking internal steps affecting their own process for the selection of candidates.'"[65]

Here the respondents have taken "internal steps affecting their own process for the selection of candidates," which the cited cases clearly entitle them to do. The advisability of those steps taken by the respondents is of no concern to the states or this Court. "And as is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational."[66] In fact, "even if a [specific state action] saves a political party from pursuing self-destructive acts, that would not justify a State substituting its judgment for that of the party."[67] Thus, if a

[63] *Rosario*, 410 U.S. at 760.

[64] The "extent to which [Oklahoma] interests make it necessary to burden the plaintiff's rights" *Celebrezze*, supra, is discussed below.

[65] *Eu*, 489 U.S. at 227; quoting *Tashjian*, 479 U.S., at 224.

[66] *La Follette*, 450 U.S. at 123-124.

[67] *Eu*, 489 U.S. at 228.

political party desires to invite members of another party into its nominating process the purported state interest in protecting against "party raiding" disappears.

Similarly, *Amici* States argue on behalf of "party loyalty," "volunteer recruiting and voter turnout efforts"[68] without demonstrating how any of these are state, as opposed to political party, interests. Reduced to their essence, these arguments merely preserve the preeminence of the established political parties and invite this court to ratify likely violations of the equal protection guarantees of the Fourteenth Amendment.

Despite suggestions from various quarters to the effect that the "two-party system" has resulted in "sound" government, there is scant empirical proof for the proposition in this case or elsewhere. There have been, and not merely coincidentally, no truly vibrant third parties in America since the introduction of the direct primary more than a century ago.[69] Thus the relative efficacy of the "two-party system" is near impossible to test. To the extent the "two-party system" assumes a state imprimatur the equal protection guarantees of the Fourteenth Amendment are clearly implicated.[70] "It demeans the strength of the two-party system to assume that the major parties need to rely on laws that discriminate against independent voters and minor parties in order to preserve their positions of

[68] *Amici* States, at 2-3.

[69] M. L. Kornbluh, *Why America Stopped Voting: The Decline of Participatory Democracy and the Emergency of Modern American Politics*, 34 (NYU Press 1999); and *see* n. 50, supra and accompanying text.

[70] *Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968).

power."[71] Meanwhile, the two party system has inadequacies that a multiparty system would resolve.[72]

Moreover, neither petitioners nor *Amici* States have shown how these interests make any restrictions on respondent's associational rights necessary. As the Court of Appeals observed, "What is less clear, and what Oklahoma fails to demonstrate, is why a few changed outcomes in tightly contested primaries would undermine the integrity of the political process, or how somewhat altered election results would diminish Oklahoma's political stability."[73]

Finally, *Amici* States resort to the so-called "party splintering and unrestrained factionalism" argument that apparently formed a basis for the results in *Storer v. Brown* and *Timmons*.[74] Setting aside the rejoinder that this is just another major party protection argument masquerading as a state interest, there has been no evidentiary showing this is a problem. Moreover, both cases are easily distinguishable. Both related to the identification of *candidates*, not to identification of the *membership* that makes up the association. They are therefore inapposite to the issues of this case.

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[71] *Timmons*, 520 U.S. at 381-382 (Stevens, J. dissenting).

[72] "Nothing is more plain to the student of history than the tendency of one party [in a two party system] to assimilate the principles and the policies of its opponent." Andrew C. McLaughlin, *Political Parties and Popular Government*, in *The Courts, the Constitution and Parties*, 151 (1912). "We choose between Tweedledum and Tweedledee." Helen Keller, *Letter to Mrs. Grindon*, Jan. 12, 1911, Published in the *Manchester Advertiser*, Mar. 3, 1911.

[73] *Clingman*, 363, F.3d at 1060.

[74] See, *Timmons*, 520 U.S. at 368 (quoting *Storer v. Brown*, 415 U.S. 724, 728 (1986)).

Rather, the principles underlying *Roberts v. U.S. Jaycees* are fundamental to analysis of the case. "Protection of the association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice."[75] Neither *Storer* nor *Timmons* were concerned with the definition of the general membership of the association or the definition of the "voice" of the membership; rather, they were concerned with the identity of the association's "standard bearer."

Moreover, the "anti-faction" reasoning raised by the *Amici* States stems in part from a misreading of Madison's Federalist No. 10. In fact, writing in Federalist No. 10 about a remedy to the problem of factions, Madison said:

> "Does it consist in the greater security afforded by a *greater variety of parties*, against the event of any one party being able to outnumber and oppress the rest? In an equal degree does the *increased variety of parties* comprised within the Union, increase this security."[76] (emphasis added)

Thus, a correct reading of Madison logically leads, as does common sense, to the conclusion that party-splintering and factionalism is less likely to occur in a multi-party system than in a two-party system. Finally, to the extent that "integrity of the political process" or preventing "factionalism" is a state interest, there is

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[75] *Roberts*, 468 U.S. at 633 (O'Connor, J., concurring in part and concurring in the judgment).

[76] The Federalist, No. 10 (Madison).

reason to suspect the motivations of those elected representatives who seek to place limits on political parties that are without elected representatives.

> "The political 'expertise' of legislators, however, may not be a completely reliable guarantee of their disinterestedness in reforming the political process. Indeed, there are reasons to believe that legislators, given free rein to inhibit political activity, might attempt to restructure the political balance of power so as principally to benefit themselves and their political allies. In fact, many political process 'reforms' seem to promise tempting short-run political advantages to incumbents and their allies."[77]

The argument against "factionalism" is an argument for preservation of the established political regime. As such it is contrary to the fundamental purpose of the First Amendment as articulated by this Court. More important, it introduces the risk of discrimination of an invidious nature against those political associations whose interests are, by definition, not represented in and without the protections of the legislative process.

CONCLUSION

> "If our system of government is to remain responsive to the will of the people – as it must – the untrammeled freedom to join together in pursuit of political goals must be secured against state intrusion, and our political organizations

[77] BeVier, 73 Calif. L. Rev. at 1076; cf. *Tashjian Amicus*, supra, at n. 50.

> must retain the freedom to invite into their ranks those citizens with whom they wish to associate."[78]

In *Tashjian*, the nine political scientists who filed an *amicus* brief with the Supreme Court noted that they held "different perspectives on the best form of primary election," but concluded nonetheless "political parties can best contribute to American politics if permitted to steer their own courses."[79]

The petitioners and *Amici* States invite this court to discriminate against a minor political party on the basis of state interests the petitioners have alleged but have not shown are "necessary to burden the plaintiff's rights." This court should decline the invitation and affirm the Court of Appeals.

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[78] *Republican Party of Connecticut v. Tashjian*, 770 F.2d 265, 267 (2nd Cir. 1985).

[79] *Tashjian Amicus*, at 3-4.

(4)

No. 04-37

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IN THE

Supreme Court of the United States

MICHAEL CLINGMAN, *et al.*,

Petitioners,

v.

ANDREA L. BEAVER, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE STATES OF SOUTH DAKOTA, MARYLAND, MASSACHUSETTS, NEW HAMPSHIRE, NEW MEXICO, NORTH CAROLINA, WEST VIRGINIA, AND UTAH AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a state primary election law that allows a political party to invite non-affiliated voters to vote in its primary election, but not voters registered with another party, violates the First Amendment.

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INTERESTS OF *AMICI CURIAE*

Amici States strongly oppose the efforts by the respondents, aided now by the Tenth Circuit, to interfere with the States' organization and management of state-funded primary elections. This Court has repeatedly recognized that the organization and management of elections is a core aspect of state sovereignty. As the Court put it in *Timmons* v. *Twin Cities Area New Party*, 520 U.S. 351, 358 (1997), "[t]he Constitution grants States broad power to prescribe the Time, Places and Manner of holding Elections for Senators and Representatives, Art. I, § 4, cl. 1, which power is matched by state control over the election process for state offices." *Id.* at 358 (quoting *Tashjian* v. *Republican Party of Connecticut*, 479 U.S. 208, 217 (1986)) (internal quotations omitted).

The theory adopted by the Tenth Circuit, however, would invalidate laws in numerous states that are designed to protect the integrity and cohesion of political parties. These laws, which create what are known as "closed" or "semi-closed" primaries, require a voter to withdraw her registration as a member of one party if she wishes to vote in another party's primary.

In the decision below, the Tenth Circuit held that such restrictions violate the First Amendment associational rights of a minor party that wishes to have voters registered in other parties vote in its primary. Although the Tenth Circuit has invalidated only Oklahoma's semi-closed primary system, the court's theory, if adopted by this Court, would also require the invalidation of semi-closed primaries in over one-third of the States. *See* Appendix A. That theory would also prevent the remaining States from adopting similar measures if they deem them desirable to promote party cohesion and integrity.

The Tenth Circuit's decision severely understates the value of semi-closed primaries. As the district court found below, requiring a voter to withdraw her registration as a member of

one party before she votes in another party's primary – the essence of a closed or semi-closed system – has a significant, positive impact on party cohesion and, indeed, on the parties' ability and incentives to boost voter participation in elections. If the Court were to invalidate such restrictions, it would, as the district court found here, "make registered party affiliations significantly less meaningful." Pet. App. 59.

For one thing, such a restriction helps to prevent what the district court called "poaching another party's primary election voters." Pet. App. 71. In its most extreme form, this is a tactic by which one party – perhaps a small fringe party – runs its primary in a way that drains voters from another party and thereby influences the results of that party's primary. This can happen as a result of good-faith efforts by the less well-established party to field the best possible candidate. Or it can result from deliberate manipulation by people attempting to influence the outcome in the "target" party.

Another purpose of semi-closed primaries, as the district court found, is that they tend to promote "party loyalty." Pet. App. 71. Voting in another party's primary – and thereby foregoing the opportunity to help one's own party choose its candidates – can reasonably be seen as an act of disloyalty to one's party. Thus, a legal regime that allows such actions may well send a message to voters that party loyalty is of little or no importance. On the other hand, a law requiring a voter to formally withdraw from his party to vote in another party's primary reinforces and encourages party loyalty, even as it helps to ensure that those who remain on a party's rolls are those who feel some measure of loyalty to the party.

For similar reasons, a semi-closed primary assists the parties with volunteer recruiting and voter turnout efforts. Those efforts are based in significant measure on party registration information generated by government election officials. But the utility of that information to the parties depends on the extent to which it accurately reflect a voter's general political preferences. If a voter can vote in any

party's primary regardless of her registration status, she will have much less incentive to change her registration when her political preferences change. By reducing this inaccuracy in voter rolls, a semi-closed system facilitates the parties' voter turnout efforts.

Amici States have a strong interest in preserving the cohesion, integrity and effectiveness of the political parties in both fielding candidates and in fostering voter participation in elections. The many States that now rely on a semi-closed primary to further those goals have an obvious interest in preserving a mechanism that they have found effective for those purposes. And States that do not currently use that mechanism have a strong interest in preserving their legislatures' ability to adopt it in the future, if they conclude it is needed to further the cohesion and effectiveness of the political parties operating in their states.

SUMMARY OF ARGUMENT

I. A semi-closed primary of the kind employed in Oklahoma does not violate the First Amendment rights of small parties and, indeed, fits comfortably within this Court's prior decisions in this important area. The Tenth Circuit was able to reach a contrary conclusion only by understating the states' legitimate interests in such a system, and by substantially overstating the burden that system imposes on third parties.

Contrary to the Tenth Circuit's conclusion, the burden imposed on small political parties is modest at best. Requiring that a voter registered with one party withdraw that registration before voting in another party's primary is analogous to, but creates a much smaller burden than, the rule that this Court upheld in *Storer* v. *Brown*, 415 U.S. 724 (1974). That rule required *candidates* wishing to run in another party's primary to "disaffiliate" from their existing parties at least a year prior to the primary election. Requiring

a *voter* to "disaffiliate" from his existing party, which in Oklahoma can be done approximately three weeks before the primary, imposes a much smaller burden on a party's associational rights.

The rule at issue here also imposes a smaller burden than the restriction upheld in *Timmons*, which prohibited candidates for one party from serving as candidates for another party. Like the rule at issue in *Storer*, that rule implicated a party's fundamental associational interest in its relationships with potential candidates. Yet this Court concluded that the burden was not sufficiently "severe" to warrant strict scrutiny. That is because the rule did not "restrict the ability of the New Party and its members to endorse, support, or vote for anyone they like"; it did not "directly limit the party's access to the ballot"; and it did not regulate the "parties' internal structure, governance, and policymaking." 520 U.S. at 363. The same is true of a semi-closed primary.

The burden at issue here is likewise smaller than the burden at issue in *Tashjian*, which held that the First Amendment requires that parties be allowed to open their primaries to unaffiliated voters. The Oklahoma statute, like other semi-closed primaries, allows parties to do that if they so choose. Unlike the closed primary in *Tashjian*, moreover, a semi-closed primary, by definition, does not require "a public act of affiliation" with a party in order to vote in that party's primary. 479 U.S. at 216. All it requires is disaffiliation from the voter's previous party.

Because the regulation at issue here imposes at best a modest burden on associational rights, it must be sustained if it promotes a State's "important regulatory interests." *Timmons*, 520 U.S. at 358 (internal quotations omitted). There can be no doubt that the semi-closed primary promotes important interests of the States that choose to use it. As noted earlier, that mechanism promotes three distinct goals: (1) preventing parties from "poaching" each others' voters

and thereby skewing the parties' decisions and messages; (2) promoting party loyalty, and (3) facilitating the parties' voter turnout efforts. Each of these interests has been recognized as important in decisions of this Court, including *Storer*, *Timmons*, and *California Democratic Party* v. *Jones*, 530 U.S. 575 (2000). Accordingly, the Tenth Circuit's decision must be reversed under this Court's precedents.

II. In the unlikely event this Court decides that *Tashjian* cannot be distinguished from the present case, *amici* respectfully submit that *Tashjian* should be overruled or limited to its facts. 479 U.S. 208. Since *Tashjian*, the Court has made clear that in analyzing First Amendment challenges to election laws it will first look to the magnitude of the burden that the law places on the challengers' rights. Only when this burden is severe will the Court apply strict scrutiny. *See, e.g.*, *Timmons*, 520 U.S. at 358.

Tashjian, however, never engaged in any meaningful inquiry into the burden created by the closed primary system challenge in that case. Instead, it simply assumed that strict scrutiny applies whenever a law imposes *any* burden on a party's associational interests.

Moreover, for reasons explained by the dissenters in *Tashjian*, closed primaries impose only minimal burdens on associational rights. *See Tashjian*, 479 U.S. at 235. Thus, under this Court's more recent decisions, the Court should not have applied strict scrutiny in *Tashjian*.

STATEMENT OF FACTS

Amici adopt the statement of facts in petitioner's brief.

ARGUMENT

The fundamental principle at issue in this case is whether States may impose a minimal, reasonable burden on the associational interests of a political party in order to preserve

the integrity of all political parties and ensure a stable primary election process. States have a powerful interest in maintaining procedures to ensure that elections are fair, honest, and efficient. *See Timmons*, 520 U.S. at 358 (citing *Storer*, 415 U.S. at 730). States also have "broad power to prescribe the Time, Places and Manner of holding Elections for Senators and Representatives, which power is matched by state control over the election process for state offices." *Id.* (internal citations and quotations omitted) (quoting *Tashjian*, 479 U.S. at 217). While there are limits on a State's authority to regulate elections, *Eu* v. *San Francisco County Democratic Central Committee*, 489 U.S. 214, 222-29 (1989), this Court has been reluctant to interfere with a State's good-faith efforts to provide a stable and equitable primary system. *Timmons*, 520 U.S. at 369-70. The Court should maintain and build upon that tradition by reversing the Tenth Circuit's decision here.

I. A SEMI-CLOSED PRIMARY DOES NOT OFFEND THE FIRST AMENDMENT AND FITS COMFORTABLY WITHIN THIS COURT'S DECISIONS, INCLUDING *TASHJIAN*.

Although this Court has emphasized that there is no "litmus-paper test" in this area, its cases provide a clear analytic framework for reviewing election laws challenged on First Amendment grounds. *Tashjian*, 479 U.S. at 213 (internal quotations omitted). This Court has repudiated "the erroneous assumption that a law that imposes *any* burden upon the right to vote must be subject to strict scrutiny." *Burdick v. Takushi*, 504 U.S. 428, 432 (1992) (emphasis added). Rather, the Court has recognized the need to weigh the States' broad powers to regulate the "[t]imes, Places and Manner of holding Elections," U.S. Const. art. I, § 4, cl. 1, with citizens' legitimate interests in freedom of speech and association, *see* U.S. Const. amend. I. Only those regulations "imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest."

Timmons, 520 U.S. at 358. Laws imposing a lesser burden are subject to a more deferential scrutiny and need only be supported by "important regulatory interests." *See id.* (internal quotations omitted). Accordingly, we turn first to the burdens allegedly imposed by the semi-closed primary regime.

A. Requiring Crossover Voters From One Party To "Disaffiliate" From That Party Prior To Voting In Another Party's Primary – Which Is All A Semi-Closed Primary Requires – Imposes At Most A Minimal Burden On A Party's Associational Interests.

The only barrier that a closed or semi-closed primary places on cross-over voters is the requirement that they disaffiliate from their existing party (if any) before the voter registration deadline. See, *e.g.*, Okla. Stat. tit. 26, § 1-104(B) (2004). The Tenth Circuit's characterization of this burden as "a severe one," Pet. App. 15, cannot be reconciled with this Court's prior holdings.

1. Preliminarily, it is useful to compare the restriction at issue here to that at issue in *Storer v. Brown*, 415 U.S. 724 (1974). That rule required candidates wishing to run in another party's primary to "disaffiliate" from their existing parties at least a year prior to the primary election. *Id.* at 733-34. Although the Court did not expressly determine whether the burden imposed by that rule was a "severe" one, the Court had no difficulty holding that it did not impose an unconstitutional burden.

The rule at issue here is analogous to the rule upheld in *Storer*. The differences, of course, are that the semi-closed primary rule requires voters to disaffiliate from their existing party before they vote in another party's primary, and it allows a voter to do so three weeks prior to the primary rather than a year before.

Such a requirement obviously imposes a much smaller burden on a party's associational rights than a rule requiring *candidates* to disaffiliate from their existing party a year before running in another party's primary. As this Court has repeatedly recognized, a party's candidates are its "'standard bearer[s].'" *Timmons*, 520 U.S. at 355, 359, 371, 373; *Tashjian*, 479 U.S. at 215-16; *Jones*, 530 U.S. at 575. They not only support the party's message, but they also play a major role in crafting that message and persuading others to accept it. *Jones*, 530 U.S. at 575. Because Oklahoma's semi-closed primary rule imposes far smaller burdens on voters than the rule sustained in *Storer* imposed on candidates, Oklahoma's rule can hardly be considered constitutionally suspect.

2. That conclusion is amply confirmed by comparing the semi-closed primary to other restrictions sustained by this Court. Indeed, this Court has repeatedly found – expressly, rather than implicitly, as in *Storer* – that various election regulations did *not* impose burdens sufficient to trigger strict scrutiny.

Burdick, which involved a challenge to Hawaii's ban on write-in candidates, is a good example. There, the Court analyzed the burden on individual rights by looking to the steps that would be necessary for the voter to cast the sort of vote the law purportedly burdened. The Court first observed that the ban on write-in candidates did not preclude a voter from casting a ballot for his favored candidate. 504 U.S. at 436. It simply required that the voter (or someone else) ensure that the candidate for which the voter wished to vote filed his candidacy before the deadline. *Id.* at 436-37.

To be sure, this required that the voter act several months prior to the primary election, in some cases gather signatures, and file with state election officials at the appropriate time. *See id.* at 435-36 (outlining the various ways of obtaining ballot access under Hawaiian law). But the Court concluded that these burdens were too minimal to warrant strict scrutiny.

See id. at 438-39 ("[T]he State's ban on write-in voting imposes only a limited burden on voter's rights to make free choices and to associate politically through the vote.").

The semi-closed primary regime now before the Court is significantly *less* burdensome than the regime upheld in *Burdick*. To vote in another party's primary, an Oklahoma voter need only fill out a single form and file it with her local election board secretary approximately three weeks before the primary election. *See* Okla. Stat. tit. 26, § 4-110.1 (2004). The semi-closed primary system thus places no burdens on the ability of small parties to *invite* voters to participate in their primaries. It simply creates procedures with which voters must comply to accept that invitation.

The burdens on association created by a semi-closed primary are likewise smaller than those at issue in *Rosario* v. *Rockefeller*, 410 U.S. 752 (1973). That case involved a challenge to a New York registration law requiring voters to declare their party affiliation eight to eleven months prior to the primary election. *Id.* at 760. This Court, however, did not find this burden sufficient to warrant strict scrutiny. The rule, the Court emphasized, did not "absolutely disenfranchise the class to which the petitioners belong[, but] . . . [r]ather, the statute merely imposed a time deadline on their enrollment." *Id.* at 757. Accordingly, strict scrutiny was not required. *See id.* at 767 (Powell, J., dissenting) (arguing that the level of scrutiny applied by the majority was "rational basis"). Here again, the simple disaffiliation requirement imposed by a semi-closed primary regime is less onerous than the lengthy and time-consuming registration requirements upheld in *Rosario* and *Burdick*.

The Court's decision in *Timmons* provides another example of the sort of burden that does not trigger strict scrutiny. 520 U.S. at 357. In that case, Minnesota had banned so-called fusion candidates, making it impossible for minor parties to combine and put forward the same candidate as their joint standard bearer. The Court noted that this rule did "not

directly preclude[] minor political parties from developing and organizing." *Id.* at 361. The Court also pointed out that "Minnesota's laws do not restrict the ability of the New Party and its members to endorse, support, or vote for anyone they like." *Id.* at 363.

As in *Burdick* and *Rosario*, the Court in *Timmons* measured the burden by looking at the steps necessary to circumvent the regulation. The Court noted that parties could continue to nominate any candidate, even a candidate chosen by another party, so long as the candidates do not "themselves prefer that other party." *Id.*

The burdens imposed by the semi-closed primary are significantly less onerous than those challenged in *Timmons*. Indeed, burdens on a party's ability to affiliate with a chosen candidate – or "standard bearer" – are inherently more serious than burdens on a party's ability to affiliate with a single voter. It is logically possible for a party to affiliate with literally millions of voters in an election cycle. In contrast, a party by definition puts forward a single candidate for each office. Nevertheless, the Court in *Timmons* held that the burdens imposed by Minnesota's candidate restrictions on the party's "associational rights – though not trivial – are not severe." *Id.* at 363.

In short, a semi-closed primary allows each political party to associate with any voter it wishes *unless* the voter himself prefers to remain formally affiliated with another party. That restriction is, if anything, less burdensome than the restrictions this Court found insufficient to warrant strict scrutiny in *Burdick*, *Rosario*, and *Timmons*.

3. The Tenth Circuit also erred in relying on this Court's decision in *Tashjian* to reach its conclusion that the Oklahoma semi-closed primary imposes a severe burden on the LPO. *See* Pet. App. 12-15. In *Tashjian*, the Court struck down a Connecticut closed primary that categorically forbade anyone from voting in a party's primary unless they first

registered with that party. However, the Court expressly warned that its reasoning would not necessarily apply to a semi-closed primary. As the Court said, a rule allowing a party to open its primary "to all voters, including members of other parties, would raise a different combination of considerations." 479 U.S. at 224 n.13. A careful comparison of the Oklahoma law with the one at issue in *Tashjian* reveals just how "different" those considerations are. Although the Court in *Tashijian* provided an extensive discussion of the importance of the rights involved in the case, its discussion of the burden involved is regrettably thin. *See id.* at 213-17. In its limited analysis of the burden, however, the Court focused on two points, neither of which applies to a semi-closed primary.

First, the Court emphasized that the challenged Connecticut law "provides no means by which the members of the Party may choose to broaden opportunities for joining the association by their own act, without any intervening action by potential voters." *Id.* at 216 n.7. In contrast, a semi-closed primary gives parties the ability to throw their primaries open to independent voters if they so choose. *See* Okla. Stat. tit. 26, § 1-104(B)(1) (2004).

The second factor discussed in *Tashjian* was the fact that the Connecticut law "insist[ed] on a public act of affiliation . . . as a condition of . . . association." *Tashjian*, 479 U.S. at 216 n.7 (first omission in original) (internal quotations omitted). A semi-closed primary has no such requirement. For instance, no voter is required to register as a Libertarian in order to vote in the LPO's primary. *See* Okla. Stat. tit. 26, § 1-104(B)(1). Indeed, voters are not required to register with any party at all. *Id.*

In sum, the semi-closed primary provides an avenue for the very kind of party association that was precluded by the Connecticut law in *Tashjian*, and it does not impose the requirement of formal affiliation on voters. While it does impose a requirement that the voter disaffiliate from one party

to vote in another party's primary, that burden on associational rights is slight at best.

4. The Tenth Circuit also erred in relying on this Court's holding in *Jones*, 530 U.S. 567, to conclude that the semi-closed primary is nevertheless subject to strict scrutiny. Indeed, the law at issue in *Jones* imposed a burden of an entirely different magnitude than a semi-closed primary.

Jones involved a law affirmatively requiring that parties open their primary elections to *all* voters regardless of party affiliation, regardless even of whether those voters simultaneously participated in the primary elections of other parties on different offices. *See id.* at 570 (describing California's blanket primary system). Under that law, a voter could simultaneously vote in the Democratic primary for president, the Republican party for senate, the Green primary for congressman, and the Libertarian primary for governor. And a voter could do so despite the opposition of the Democratic, Republican, Green, and Libertarian parties to the required inclusion of such voters in their primaries. As the Court observed, the law "forces" political parties "to adulterate their candidate-selection process. . . . Such forced association has the likely outcome . . . of changing the parties' message. We can think of no heavier burden on a political party's associational freedom." *Id.* at 581-82.

A semi-closed primary places no comparable burden on political parties. It does not rip open their internal decision-making process and flood it with voters of the state's choosing rather than the party's choosing. Instead, it allows the parties to govern themselves subject only to the kind of "'reasonable, nondiscriminatory restrictions,'" *Burdick*, 504 U.S. at 434, that the Court found did not impose a severe burden in *Burdick*, *Timmons*, and *Rosario*. Accordingly, the Tenth Circuit erred in overturning the District Court's finding and in concluding that the Oklahoma law imposed a severe burden warranting strict scrutiny.

B. States Have Reasonable, Non-Discriminatory Reasons for Requiring Such Disaffiliation, And They Are, At a Minimum, Weighty Enough To Justify The Limited Burden On A Party's Associational Interests.

Besides overstating the burdens on the parties' associational rights, the Tenth Circuit understated and, indeed, largely ignored the state interests that underlie the semi-closed primary. As the district court found, those interests include: first, preventing one party from "poaching" another party's voters, thereby skewing the results of the second party's primary; and second, encouraging party loyalty and cohesion. Closed or semi-closed primaries also produce a third benefit: ensuring greater accuracy in voter registration rolls that the parties use to increase voter turnout. We address each of these interests in turn.

1. The District Court Correctly Determined That The Disaffiliation Requirement Helps Prevent One Party From "Poaching" Another Party's Voters, Thereby Potentially Skewing The Results In The Second Party's Primary.

As to the first interest: as the district court recognized, this case "affects political parties other than the party challenging the legislation in a manner and to an extent that was not present in *Tashjian*." Pet. App. 57. Unlike the rule at issue in *Tashjian* – requiring that a party be allowed to invite independent voters to participate in its primary – the rule sought by respondents, and adopted by the court of appeals, would allow one party to "poach[] another party's primary election voters." *Id.* at 71 (emphasis added).

The district court found that such a requirement could have a serious, adverse effect on the party that is the victim of poaching. Drawing an analogy to *Jones*, the district court determined that:

> the primary election format which plaintiffs assert is constitutionally *required* would have a quality which was identified as constitutionally *suspect* in *Jones*: the parties whose voters would be invited by the [LPO] into its primary would be induced . . . to skew their positions from those which they "would choose if left to their own devices."

Pet. App. 68-69. Thus, the district court concluded that the primary system sought by the LPO would "'disrupt' other parties 'from without.'" *Id.* at 69. Accordingly, the court determined that the State has an appropriate role as a "referee" between the parties (*id.* at 60), and that it may therefore "bar a party from poaching another party's primary election voters." *Id.* at 71.

The Tenth Circuit rejected this analysis. It reasoned that "the district court effectively would add a new associational right that has to this point been absent from constitutional discussion – the ability of a group to harness and control the associational opportunities of its members." Pet. App. 22. The Tenth Circuit concluded that because (in its view) the political parties enjoy no such right under the Constitution, the State could not rely on such considerations to "counterbalance" "the associational rights asserted by the LPO." *Id.* But the Tenth Circuit's analysis is wrong for at least three reasons.

First, the States' interest in shielding political parties from factionalism does not depend solely on the parties' own constitutional rights. As this Court put it in *Eu*, "a State may enact laws to prevent the disruption of the political parties from without," 489 U.S. at 227 (internal quotations omitted), even if such disruptions would not violate the parties' constitutional rights of speech or association.

Other decisions of this Court confirm this fundamental principle. In *Storer*, as noted, the Court upheld another "party-disaffiliation" rule, one that denied ballot positions to

independent candidates who had voted in the immediately preceding primary elections or had a registered party affiliation at any time during the year before the same primary elections. *See* 415 U.S. at 728. The Court did not determine that this rule was necessary, or even helpful, to protect the parties' constitutional rights. Nevertheless, the Court sustained the rule on the basis of the *State's* interest in promoting "stability" and reducing the risk of "splintered parties and unrestrained factionalism." *Id.* at 736.

The same was true in *Timmons*, in which, as noted, the Court sustained a Minnesota law barring "fusion" candidates. Once again, the Court did not rest its decision on the parties' associational rights, although they were certainly implicated. Instead, the Court based its decision on the *States'* "strong interest in the stability of their political systems." 520 U.S. at 366. That interest, the Court held, permits States "to enact reasonable election regulations that may, in practice, favor the traditional two-party system, . . . and that temper the destabilizing effects of party-splintering and excessive factionalism." *Id.* at 367.

In short, regardless of the parties' own constitutional rights, the Court held that "[t]he Constitution permits the Minnesota Legislature to decide that political stability is best served through a healthy two-party system." *Id.* That, essentially, is what Oklahoma has done here, and its regulation should be sustained for the same reasons.

Second, the Tenth Circuit had no business attempting to "balance" the associational interests of the LPO and those it seeks to invite to its primary against the State's legitimate interests. To be sure, this Court in *Timmons* held that, "[w]hen deciding whether a state election law violates First and Fourteenth Amendment associational rights, we *weigh* the 'character and magnitude' of the burden the State's rule imposes on those rights against the interests the State contends justify that burden." *Id.* at 358 (internal quotations omitted) (emphasis added). But that is not the same as

"balancing" these interests *against* each other. Instead, where, as here, a regulation imposes only "[l]esser burdens" on voters' or parties' associational rights "a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Id.* (internal quotations omitted).

Here, there can be no doubt that the State has an "important regulatory interest" in avoiding factionalism and instability. Nor can there be any doubt – indeed, the Tenth Circuit did not dispute – that this interest would be undermined if parties were permitted to "poach" voters from other parties. Accordingly, because the regulation here imposes only a modest burden on associational interests, the Tenth Circuit should have upheld it without any "balancing" of interests.

Third, the Tenth Circuit's analysis ignores the threat, mentioned briefly in the district court's analysis, that "poaching" of one party's members by another party will skew the results of the first party's primary elections.

As this Court noted in *Jones*, primary elections allow political parties to choose who will be their "standard bearer" who will represent the party and its views in the general election. *Jones*, 530 U.S. at 575-76. While this is an intra-party choice, a State has an interest in ensuring that the decision is made in a democratic manner. *Id.* at 572. At the primary stage, then, the State has an interest in ensuring not only that individual voters are able to cast their ballots, but also that parties have the opportunity to elect their own representatives uninhibited by external forces. *Id.*

Here, there can be no question that the regime imposed by the Tenth Circuit could skew both the results of other parties' primaries and, as a consequence, the parties' messages. As the District Court correctly held, the "party-option open primary . . . in Oklahoma as sought by the plaintiffs would likely affect the outcome of some primary elections." Pet. App. 49. In fact, "the historical information which is in hand

with respect to the number of very close major party primary races in Oklahoma indicates convincingly that, at the margin, implementation of a party-option open primary system would affect Oklahoma primary elections." *Id.*

A semi-closed system, by contrast, helps to insulate each party from the other as they choose their candidates and messages. It helps to ensure that, during the primaries, the parties are not rivals for the attention of all voters, but are instead free to have intra-party discussions to determine the best person to represent their interests. *Jones*, 530 U.S. at 575.

Requiring open primaries (at the party's option) would thus transform a process that is intended to provide a democratic system for a party to choose its own leaders and candidates into one where any voter may help choose the candidates of any party. States are entitled to reject such a system if they so choose. As Justice Brandeis famously explained in *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), states are "laboratories of democracy" and are entitled to take different approaches to problems of law and policy. *See also Jones*, 530 U.S. at 590 ("A State's power to determine how its officials are to be elected is a quintessential attribute of sovereignty.") (Stevens, J., dissenting); *Tashjian*, 479 U.S. at 230-34 (Stevens, J., dissenting) (recognizing that the Constitution does not require voter qualifications to be identical throughout the states). While the Constitution imposes some limits on a State's choices in this area, it does not prevent a State from requiring voters to relinquish their affiliation with one party before voting in another party's primary.

2. The District Court Correctly Determined That The Disaffiliation Requirement Fosters Party Loyalty And Cohesion.

Another purpose for closed or semi-closed primaries, as the district court found, is that they tend to promote "party

loyalty." Pet. App. 71. Although the Tenth Circuit did not bother to respond to this finding, much less dispute it, it was and is correct.

This Court's decisions leave no doubt that promoting party loyalty is itself an "important regulatory interest[]." *Timmons*, 520 U.S. at 358. As already noted, *Storer* recognized the important state interest in promoting "stability" and reducing the risk of "splintered parties and unrestrained factionalism." 415 U.S. at 736. *Timmons* likewise recognized as important state interests the avoidance of "party-splintering and excessive factionalism," and added to those interests the interest in preserving "a healthy two-party system." 520 U.S. at 367; *see also* Michael A. Fitts, *Back to the Future: The Enduring Dilemmas Revealed in the Supreme Court's Treatment of Political Parties, in The U.S. Supreme Court and the Electoral Process* 97, 99-101 (David K. Ryden ed., 2d ed. 2002). Party loyalty obviously serves all of these goals. *See generally* Kelly D. Patterson, *Political Parties and the Maintenance of Liberal Democracy* 14-23 (1996) (discussing the importance of party cohesion in promoting efficient Congressional action).

Nor can there be any doubt that the semi-closed primary system promotes and encourages party loyalty. As this Court put it in *Jones*, "[r]epresentative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promotion among the electorate candidates who espouse their political views." 530 U.S. at 574. This banding together takes place through the choice of a "standard bearer," the party nominee who will voice the party's position in the general election. *See* Kelly D. Patterson, *Political Parties and the Maintenance of Liberal Democracy* 24-59 (explaining the usual agreement between Presidential candidates and party platform). The choice of a nominee is thus "the crucial juncture at which the appeal to common principles may be translated into concerted action,

and hence to political power in the community." *Jones*, 530 U.S. at 575 (internal quotations omitted).

It follows that, at the primary election stage, there is a valid interest in requiring that an individual "formally become a member [of the party]; and once he does so, . . . *limit[ing him] to voting for candidates of that party.*" *Id.* at 577 (original emphasis omitted) (emphasis added). That is precisely what a closed or semi-closed primary does – it limits a voter who has registered with a given party to "voting for candidates of that party." Voting in another party's primary – and thereby foregoing the opportunity to help one's own party choose its candidates can reasonably be seen as an act of disloyalty to the party of which one is a member. By foreclosing such action, the semi-closed primary directly forecloses that kind of disloyalty.

A semi-closed primary also encourages and promotes party loyalty indirectly. A regime that allows voters who are registered members of one party to vote in another party's primary may well send a message to voters at large that party loyalty is of little or no importance. As the District Court warned, "'the party's right to define its membership becomes meaningless if it cannot limit membership to those individuals who are willing to identify themselves with the party and its message.'" Pet. App. 70 (quoting Borden, *Primary Elections*, 38 Harv. J. on Legis. 263, 277 (2001)). And this, of course, makes "registered party affiliations significantly less meaningful in the Oklahoma primary election system." *Id.*

On the other hand, a law requiring a voter formally to withdraw from his party in order to vote in another party's primary tends to reinforce and encourage party loyalty. At the same time, it helps to ensure that those who remain on a party's rolls are, in fact, those who feel most loyalty to the party.

In short, States that choose to organize their primaries as Oklahoma does have an "important regulatory interest[]" in

party loyalty and cohesion. That interest alone is more than enough to justify the kind of "reasonable, nondiscriminatory restrictions" inherent in a semi-closed primary. *Cf. Timmons*, 520 U.S. at 358 (internal quotations omitted).

3. The Disaffiliation Requirement Also Facilitates The Parties' Voter Turnout Efforts.

Finally, a closed or semi-closed primary system facilitates the parties' voter turnout efforts. As Justice Kennedy pointed out in *Jones*, "[e]ncouraging citizens to vote is a legitimate, indeed essential, state objective." 530 U.S. at 587 (Kennedy, J., concurring). Several other decisions of this Court have made the same point. See, *e.g.*, *Tashjian*, 479 U.S. at 220 (noting the importance of an informed electorate); *Eu*, 489 U.S. at 228 (same).

Accurate voter registration rolls, moreover, have a direct effect on voter participation. An oft-used and effective means by which political parties energize their core voters is by contacting them and reminding them to vote.[1] Yet these grass-roots efforts depend in large part on accurate voter registration rolls. Without accurate rolls, the party is left with little information on who, in fact, are the members of their organization, placing additional burdens on often already overtaxed organizations. *See, e.g., McConnell* v. *Federal*

[1] *See, e.g.*, Alan Johnson & Catherine Candisky, *New Emphasis on Voter Turnout Will Continue*, Columbus Dispatch, Nov. 7, 2004, at A1 (reporting that the Ohio Republican party made 3.5 million phone calls, knocked on 1.1 million doors and sent out 3.5 million pieces of literature in its grass-roots efforts in the recent Presidential election); Thomas Frank, *Experts Project An Upsurge In Voting*, Times Union, Oct. 31, 2004, at A14 (political parties will spend $300 million in efforts to encourage potential supporters through phone calls, e-mails and visits to ensure that they vote in the Presidential election); Jeff Zeleny, *Campaigns Drum Up Turnout*, Chi. Trib., Oct. 24, 2004, at C1; *Eu*, 489 U.S. at 223 (noting that an "'election campaign is a means of disseminating ideas as well as attaining political office.'") (quoting *Illinois State Bd. of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 186 (1979)).

Election Comm'n, 540 U.S. 93 (2003); *Colorado Republican Fed. Campaign Comm.* v. *Federal Election Comm'n*, 518 U.S. 604 (1996) (plurality opinion) (campaign finance laws leave parties with increasingly complex regulations on the speech which govern their activities, and occasionally limit the manner in which they may use funds).

When a voter is not required to disaffiliate before participating in another party's primary, however, the voter registration rolls are no longer an accurate reflection of party activity or feeling. As a result, as the district court found, party affiliation becomes "significantly less meaningful" (Pet. App. 59) and registration rolls thus become significantly less valuable tools for identifying and contacting like-minded voters. When that happens, the parties are unable to rely upon the registration rolls to contact their members, and must incur greater effort and expense to encourage voter participation.

By contrast, under a closed or semi-closed primary system, a voter whose political preferences have changed and who therefore wishes to vote in another party's primary must, at a minimum, withdraw her registration before she votes in a different party's primary. This helps ensure that voter registration rolls more accurately reflect the voters' true political preferences. And this, in turn, reduces the risk that a party volunteer contacting voters who are registered members of his party will waste his time on voters who do not, in fact, share the party's preferences and beliefs. By reducing the cost to a party of turning out like-minded voters, the closed or semi-closed system facilitates the parties' turnout efforts, and thereby (all else being equal) fosters increased voter turnout.

* * * *

In short, semi-closed primaries are an important and widely-used tool with which the States carry out their constitutionally required role of regulating "the Time, Place and Manner" of elections. Many states – more than one-third

of them – use these primaries to advance their important interests in protecting the integrity of the political parties and fostering voter participation in the electoral process. *See* Appendix A.[2] Semi-closed primaries, moreover, fit comfortably within this Court's First Amendment jurisprudence. The Tenth Circuit's contrary conclusion should therefore be reversed.

II. ALTERNATIVELY, IF THE COURT PERCEIVES AN IRRECONCILABLE CONFLICT BETWEEN A SEMI-CLOSED SYSTEM AND THE REASONING OF *TASHJIAN*, THAT DECISION SHOULD BE OVERRULED OR LIMITED TO ITS FACTS.

As explained above, the Tenth Circuit's decision to invalidate semi-closed primaries relied primarily upon this Court's decision in *Tashjian*. Although *amici* believe *Tashjian* casts no serious doubt on the constitutionality of semi-closed primaries, if the Court decides that there is no meaningful distinction between semi-closed primaries and the closed primaries stuck down in *Tashjian*, *amici* respectfully urge that *Tashjian* be overruled or limited to its facts. The majority opinion in that case failed to undertake the close analysis of burdens on associational rights required by this Court's subsequent decisions. Those decisions also establish that the burdens on which the *Tashjian* majority relied cannot

[2] Ariz. Rev. Stat. § 16-241 (2004); Cal. Elec. Code § 13102 (West 2004); Colo. Rev. Stat. § 1-3-101 (2004); Conn. Gen. Stat. § 9-431 (2003); Del. Code. Ann. tit. 15, § 3110 (2004); Fla. Stat. ch. 101.021 (2004); Iowa Code §§ 43-38, -42 (2004); Kan. Stat. Ann. § 25-4502 (2003); Ky. Rev. Stat. Ann. § 116.055 (Michie 2004); La. Rev. Stat. Ann. § 18-1280.25 (2004); Mass. Gen. Laws. ch. 53, § 37 (2004); Neb. Rev. Stat. § 32.312 (2004); Nev. Rev. Stat. 293.287 (2004); N.H. Rev. Stat. Ann. § 659.14 (2004); N.J. Rev. Stat. § 19:23-45.1 (2004); N.M. Stat. Ann. § 1-12-7 (2004); N.Y. Elec. Law § 1-104.9 (McKinney 2004); N.C. Gen. Stat. § 163-59 (2004); Okla. Stat. tit. 26, § 1-104 (2004); 25 Pa. Stat. § 292 (2004); R.I. Gen. Laws §§ 17-9.1-24, -15-24 (2004); S.D. Codified Laws § 12-6-26 (Michie 2004); W.Va. Code § 3-1-35 (2004); Wyo. Stat. Ann. § 22-5-212 (Michie 2004).

be considered sufficiently "severe" to require strict scrutiny under current doctrine.

A. *Tashjian*, Which Was Decided Before *Burdick* Established The Distinction Between "Severe" And Modest Burdens, Incorrectly Assumed That Any Burden On Associational Rights Triggers Strict Scrutiny.

Six years after the Court decided *Tashjian*, it decided in *Burdick* that "the rigorousness of our inquiry into the propriety of a state election law depends upon the *extent* to which a challenged regulation burdens First and Fourteenth Amendment rights." 504 U.S. at 434 (emphasis added). Only laws that place a severe burden on those rights, the Court held, are subject to strict scrutiny. *See id.* ("[W]hen those rights are subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance.") (internal quotations omitted). To be sure, many of the Court's cases prior to *Burdick* contained lengthy considerations of the severity of the burden imposed on the protected activity and fit comfortably within the *Burdick* framework. *See, e.g., Anderson* v. *Celebrezze*, 460 U.S. 780, 786-95 (1983) (containing a lengthy discussion of the burdens imposed by the challenged law). But *Burdick* appears to have been the first decision in which this Court firmly established that a regulation imposing relatively modest burdens on First Amendment rights is not subject to strict scrutiny.

The *Tashjian* majority, however, imposed strict scrutiny without any real consideration of the severity of the burdens involved. Instead, the majority's opinion focused almost exclusively on the importance of the protected rights asserted by the challenger. The opinion insisted, for example, that the "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the liberty assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech," *Tashjian*, 479 U.S. at 214 (internal quotations omitted), and that "the

freedom to join together in furtherance of common political beliefs necessarily presupposes the freedom to identify the people who constitute the association," *id.* (internal quotations omitted).

These statements are undoubtedly correct characterizations of the importance of the constitutional rights at issue. But establishing the importance of those rights does not answer the question of how much of a burden the challenged law places upon them.

In short, in light of *Burdick* and subsequent decisions, it was error for the *Tashjian* majority to conclude that strict scrutiny was warranted *without* a finding that the burdens on First Amendment rights were severe.

B. As The Dissent In *Tashjian* Pointed Out, Requiring A Voter To Register With A Party Before Voting In That Party's Primary Imposes Only A Modest Burden On The Party's Associational Interests, One That Is More Than Outweighed By The State's Legitimate Interest In Party Integrity.

If the Court were to undertake now the analysis that the *Tashjian* majority ignored, *amici* believe the Court should and would conclude that the burden at issue there was too small to warrant strict scrutiny, and would find that a fully closed primary adequately furthers important state interests.

1. To be sure, as explained above, the burden on association at issue in *Tashjian* was greater than that at issue here. The regulation there required a voter registered with one party but wishing to vote in another party's primary not only to disaffiliate from her existing party, but also to *join* the new party. *See* 479 U.S. at 212.

But even that burden, as three of the current Justices forcefully argued in dissent, is small. *Id.* at 235 (Scalia, J. dissenting) (joined by Rehnquist, C.J., and O'Connor, J.). As

the dissent pointed out, a voter "who, while steadfastly refusing to register as a Republican, casts a vote in the Republican primary, forms no more meaningful an 'association' with the Party than does the independent or the registered Democrat who responds to questions by a Republican Party pollster." *Id.* The only way a party establishes a truly meaningful association with a voter (as opposed to a candidate or donor) is by persuading the voter to join the party. If a voter does not wish to join the party as a condition of voting in its primary, that is a good indication that the voter does not really wish to have a serious association with the party. And a law imposing that condition thus cannot be seen as imposing any substantial burden on the party's associational rights.

To put the point another way, under closed primary systems, voters and parties are free to associate as they please. There is no restriction on any citizen's ability to vote in the primary of his or her choice. The only requirement is that the citizen formally affiliate with the party whose future destiny he or she is seeking to shape. This is simply not a significant burden.

This conclusion is supported by the Court's subsequent decisions. In *Timmons*, for example, the Court found that a requirement that candidates formally associate with a single party did not impose a severe burden. *Timmons*, 520 U.S. at 363. If requiring exclusive affiliation of *candidates* appearing on a party's ballot is not a severe burden, then requiring the exclusive affiliation of *voters* prior to casting a ballot in party's primary also cannot be a severe burden. In both cases the law merely places a requirement of minimum formality on the affiliation.

2. In light of the minimal burden a closed primary imposes, the state's interest in maintaining the integrity of political parties are more than sufficient to justify such a regime. As the dissent in *Tashjian* pointed out, the primary system itself was developed to protect political parties'

integrity by ensuring that their membership is involved in selecting candidates. 479 U.S. at 236-37 (Scalia, J., dissenting). Furthermore, closed primaries can serve the state's legitimate interest in protecting political parties from raiding by other parties. *See Rosario*, 410 U.S. at 760 (discussing the state's legitimate interest in preventing raiding).

Whatever the strength of such interests under strict scrutiny, they are more than adequate to justify the less exacting standard that applies to laws that place only a small burden on associational rights. *Tashjian*, therefore, was wrongly decided. It should be overruled or limited if the Court believes it is a significant obstacle to sustaining the validity of semi-closed primaries.[3]

[3] *Tashjian* could be overruled or limited to its facts without any violence to this Court's jurisprudence in this area. The only case during the period between *Tashjian* and *Burdick* that dealt with a challenge to an election-related law was *Eu*, 489 U.S. at 222-29. There, the Court relied on *Tashjian* to strike down a California law that forbade parties from endorsing candidates in their own primaries and imposed complex regulations on the mechanisms by which the parties choose their own officers. But those restrictions would be invalid without *Tashjian*. The prohibition on endorsing candidates is a content-based speech restriction and would be subject to strict scrutiny under ordinary free-speech law. *See Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys."). And the regulations of party officers is precisely the sort of interference with internal party affairs that the Court has found to be a severe burden in other cases. *See, e.g., Jones*, 530 U.S. at 573 (discussing the limits on states' ability to regulate the "parties' internal processes").

CONCLUSION

The decision below should be reversed.

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APPENDIX A

CLOSED OR SEMI-CLOSED PRIMARIES

Arizona	Ariz. Rev. Stat. § 16-241 (2004)
California	Cal. Elec. Code § 13102 (West 2004)
Colorado	Colo. Rev. Stat. § 1-3-101 (2004)
Connecticut	Conn. Gen. Stat. § 9-431 (2003)
Delaware	Del. Code. Ann. tit. 15, § 3110 (2004)
Florida	Fla. Stat. ch. 101.021 (2004)
Iowa	Iowa Code §§ 43-38, -42 (2004)
Kansas	Kan. Stat. Ann. § 25-4502 (2003)
Kentucky	Ky. Rev. Stat. Ann. § 116.055 (Michie 2004)
Louisiana	La. Rev. Stat. Ann. § 18-1280.25 (2004)
Massachusetts	Mass. Gen. Laws. ch. 53, § 37 (2004)
Nebraska	Neb. Rev. Stat. § 32.312 (2004)
Nevada	Nev. Rev. Stat. 293.287 (2004)
New Hampshire	N.H. Rev. Stat. Ann. § 659.14 (2004)
New Jersey	N.J. Rev. Stat. § 19:23-45.1 (2004)
New Mexico	N.M. Stat. Ann. § 1-12-7 (2004)
New York	N.Y. Elec. Law § 1-104.9 (McKinney 2004)
North Carolina	N.C. Gen. Stat. § 163-59 (2004)
Oklahoma	Okla. Stat. tit. 26, § 1-104 (2004)
Pennsylvania	25 Pa. Stat. § 292 (2004)
Rhode Island	R.I. Gen. Laws §§ 17-9.1-24, -15-24 (2004)
South Dakota	S.D. Codified Laws § 12-6-26 (Michie 2004)
West Virginia	W.Va. Code § 3-1-35 (2004)

Wyoming	Wyo. Stat. Ann. § 22-5-212 (Michie 2004)

OPEN PRIMARIES

Alaska	Alaska Stat. § 15-25-010 (2003)
Arkansas	Ark. Code. Ann. §§ 7-3-101, -7-308 (2003)
Georgia	*See* Georgia Secretary of State web site: http://www.sos.state.ga.us/elections/elections/voter_information/default.htm
Hawaii	Hawaii Rev. Stat. § 12-31 (2003)
Idaho	Idaho Code § 34-411 (2004)
Illinois	10 Ill. Com. Stat. 5/4-22 (2004)
Indiana	Ind. Code Ann. § 3-7-13-2 (2004)
Michigan	Mich. Comp. Laws. § 168.575 (2004)
Minnesota	Minn. Stat. § 201.061(3) (2003) (allowing registration on the day of election without requiring registration for a particular party).
Mississippi	*See generally* Miss. Code Ann. §§ 23-15-191, *et seq.* (2004) (outlining primary election procedure)
Missouri	*See* Mo. Rev. Stat. §§ 115.137, .397 (2004)
Montana	Mont. Code Ann. § 13-10-301(2) (2004)
North Dakota	*See generally*, N.D. Cent. Code § 16.1-01, *et seq.* (2003) (outlining North Dakota election law, which does not require voter registration)

Ohio	*See generally* Ohio Rev. Code Ann. §§ 3505.18, 3513.13 (Anderson 2004) (party affiliation determined by voting in a primary, but not before)
South Carolina	S.C. Code Ann. § 7-9-20 (2003)
Tennessee	Tenn. Code Ann. § 2-7-115 (2004)
Texas	*See generally* Tex. Elec. Code Ann. §§ 172.111, *et seq.* (Vernon 2004) (outling primary election procedure)
Vermont	Vt. Stat. Ann. tit. 17, § 2363(a) (2004)
Virginia	Va. Code Ann. § 24.2-545(A) (2004)
Wisconsin	Wis. Stat. § 8.12 (2003)

OTHER PRIMARY SYSTEMS

Alabama	Ala. Code § 17-16-14 (2004) (no requirement exists that mandates registration for any particular party)
Maine	Me. Rev. Stat. Ann. tit. 21-A, § 340 (2003)
Maryland	Md. Code Ann., Elec., § 8-202(c) (2003) (requiring each party to give the state notice if it wishes to open its primary)
Oregon	Or. Rev. Stat. § 254.365(1) (2003)
Utah	Utah Code Ann. § 20A-3-104.5 (2004)
Washington	Wash. Rev. Code. § 29A.52.130 (2004)